

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Cathy C. Cardillo<sup>1</sup>  
Complainant**

**GRC Complaint No. 2005-158**

**v.**

**City of Hoboken Zoning Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Plans for the renovation of 901 Hudson Street, Hoboken, N.J.

**Request Made:** July 14, 2005<sup>3</sup>

**Response Made:** July 14, 2005

**Custodian:** Joel Mestre

**GRC Complaint filed:** August 19, 2005

**Background**

**March 9, 2006**

Government Records Council's ("Council") Interim Order. At its March 9, 2006 public meeting, the Council considered the March 3, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that an *in camera* inspection of the documents responsive to the Complainant's July 14, 2005 OPRA request shall be conducted by the Council to determine what information, if any, is disclosable.

**April 7, 2006**

Certification of the Custodian with the following attachments:

- January 28, 2005 – Zoning Application.
- February 1, 2005 – First Certificate of Zoning Compliance.
- Lower Level Cross Section Schematic.
- Memo To Al Arezzo from Joel Mestre.
- Blue Print Pages labeled T-1, A-01, A-02, A-03, A-04 and A-05.

The Custodian's certification states that the records provided are those requested by the Council for *in camera* inspection. The Custodian's certified index indicates the following exemptions:

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<sup>1</sup> The Complainant has not obtained legal counsel.

<sup>2</sup> Joseph Sherman is legal counsel for the City of Hoboken. His office is located in the municipal building.

<sup>3</sup> There were two requests submitted on July 14, 2005. There was only one attached to the complaint. The attached request is at issue in this case.

<b>Title &amp; Date</b>	<b>Pages</b>	<b>General Nature Description</b>	<b>Claimed Statutory Exemption(s) and/or Privilege(s)</b>	<b>Explanation Why the Claimed Exemption(s) and/or Privilege(s) Applies</b>
Set of Blue Prints	5	Architectural renderings project numbers 04-391	<u>N.J.S.A.47:1A-1</u>	Proprietary to architect
Zoning Application <sup>4</sup>	1	Application for Zoning Certificate	N/A	N/A
First Zoning Certificate <sup>2</sup>	1	Certificate of Compliance	N/A	N/A
Memo to Construction Official 7/8/05 <sup>2</sup>	1	Interoffice memo's correction to First Certificate	N/A	N/A

### **Analysis**

At its March 9, 2006 public meeting, the Council considered the March 3, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. Among documents reviewed was the Statement of Information in which, Counsel stated that the building plans for 901-903 Hudson Street, Hoboken were made available for review, but copies were not made available. Counsel stated that the requested information was proprietary information that was exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 The GRC also reviewed a supplemental certification of the Custodian that stated in part:

- Blueprints on file cannot be copied, however they are available for review.
- Based upon advice of the Counsel, it is the Custodian's position that blueprints are proprietary information. While the City will allow review of the blueprints, they will not release a copy.
- City Counsel advised the Custodian that the proprietary status of the blueprints is not waived if the requestor views them, however if they want copies, they are not Government Records because they are not property of the City, they are the property of a private architect.

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<sup>4</sup> The Custodian did supply a copy of the Zoning Application, First Zoning Certificate, and Memo to Construction Official dated 7/8/2005, however they are not records relevant to the Complaint.

- The requestor who received copies of the blueprints for 901 Hudson Street received them from the architect not the city.

Based upon the review of information on the March 3, 2006, Findings and Recommendations of the Executive Director, the Council found that an *in camera* inspection of the documents responsive to the Complainant's July 14, 2005 OPRA request shall be conducted by the Council to determine what information, if any, is disclosable.

An *in camera* inspection was conducted on the Plans for the renovation of 901 Hudson Street, Hoboken, N.J. Based on this *in camera* inspection, the Council finds:

(1) Plans for the renovation of 901 Hudson Street, Hoboken, N.J. (5 pages)

- Page T-1 – This page is disclosable in its entirety. This document contains general information inclusive of: a symbols legend, general notes, zoning map location, architect firms name, address phone and fax numbers, site plan, ownership of documents notice, project description, project number, initials of the illustrator, and the initials of the person who “checked” the document.
- Page A-01 – The Basement and 1<sup>st</sup> Floor Demolition Plan. The demolition legend, demolition note at the top of the page, titles at the bottom of the page, and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the demolition schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and windows which could jeopardize the security of the building and the persons residing in the building.
- Page A-02 – The 2<sup>nd</sup> Floor and 3<sup>rd</sup> Floor Demolition Plan. The demolition legend, demolition note at the top of the page, titles at the bottom of the page, and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the demolition schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and windows which could jeopardize the security of the building and the persons residing in the building.
- Page A-03 - The Basement Floor Plan. The legend, general notes, title of the document and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the design schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A-1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and window and the location of all rooms inside which could jeopardize the security of the building and the persons residing in the building.

- Page A-04 – The 1<sup>st</sup> Floor Plan. The legend, general notes, title of the document and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the design schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A-1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and window and the location of all rooms inside which could jeopardize the security of the building and the persons residing in the building.
- Page A-05 – The 2<sup>nd</sup> Floor Plan and the 3<sup>rd</sup> Floor Plan. The legend, general notes, title of the document and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the design schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A-1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and window and the location of all rooms inside which could jeopardize the security of the building and the persons residing in the building.

In addition to performing an *in camera* inspection, the GRC staff conducted further investigation regarding the difference between site plans and building plans. While site plans would be disclosable information because they relate to things such as ground levels and elevations, building plans are not disclosable because they relate to the interior design and security components of a building (i.e. boilers, water heaters, windows, doors, vents, etc.).

### **Conclusions and Recommendations**


The Executive Director respectfully recommends that the Council find that:


1. Plans for the renovation of 901 Hudson Street, Hoboken, N.J. (5 pages)
  - Page T-1 – This page is disclosable in its entirety. This document contains general information inclusive of: a symbols legend, general notes, zoning map location, architect firms name, address phone and fax numbers, site plan, ownership of documents notice, project description, project number, initials of the illustrator, and the initials of the person who “checked” the document.
  - Page A-01 – The Basement and 1<sup>st</sup> Floor Demolition Plan. The demolition legend, demolition note at the top of the page, titles at the bottom of the page, and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the demolition schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal

and remainder of doors and windows which could jeopardize the security of the building and the persons residing in the building.

- Page A-02 – The 2<sup>nd</sup> Floor and 3<sup>rd</sup> Floor Demolition Plan. The demolition legend, demolition note at the top of the page, titles at the bottom of the page, and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the demolition schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and windows which could jeopardize the security of the building and the persons residing in the building.
- Page A-03 - The Basement Floor Plan. The legend, general notes, title of the document and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the design schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A-1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and window and the location of all rooms inside which could jeopardize the security of the building and the persons residing in the building.
- Page A-04 – The 1<sup>st</sup> Floor Plan. The legend, general notes, title of the document and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the design schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A-1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and window and the location of all rooms inside which could jeopardize the security of the building and the persons residing in the building.
- Page A-05 – The 2<sup>nd</sup> Floor Plan and the 3<sup>rd</sup> Floor Plan. The legend, general notes, title of the document and all items contained under the architect firm name should be disclosed. The remainder of the document, which includes the design schematics and plans, is exempt from disclosure and should be redacted pursuant to N.J.S.A.47:1A-1.1. This information contains security information which would jeopardize the building and persons therein. The exempt portion of this document contains information about the removal and remainder of doors and window and the location of all rooms inside which could jeopardize the security of the building and the persons residing in the building.

2. The Custodian shall comply with these Conclusions and Recommendations within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.

Prepared By:   
Kimberly Gardner  
Case Manager

Approved By:   
Catherine Starghill, Esq.  
Executive Director

September 7, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Amelia Spaulding<sup>5</sup>  
Complainant**

**GRC Complaint No. 2004-199**

**v.**

**County of Passaic<sup>6</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Electronic or microfilm copies of the County's recorded real estate records from 1985 to present.

**Custodian:** Benemina Sancivieri

**Request Made:** October 21, 2004

**Response Made:** November 9, 2004

**GRC Complaint Filed:** November 29, 2004

**Background**

**July 13, 2006**

Government Records Council's ("Council") Interim Order. At its July 13, 2006 public meeting, the Council considered the July 6, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations with one amendment. The Council, therefore, found that:

1. The Custodian unlawfully denied access to the requested records.
2. There is no restriction against commercial use under OPRA and it is not the province of the GRC to rule on this public policy aspect.
3. Based on court precedent, the requested records are government records and are not exempt from disclosure under common law.
4. The fees prescribed under N.J.S.A. 22A:4-12 are provided for "a *search* of all records ..." Since the substance of this complaint refers to an OPRA records request and not a "search" of County recorded records, N.J.S.A. 22A:4-12 does not apply.

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<sup>5</sup> Represented by Yianni Pantis, Esq. in association with Mary Kay Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti LLP (Trenton, NJ).

<sup>6</sup> Represented by Greyson Hannigan, Assistant Counsel, County of Passaic (Paterson, NJ).

5. When the county clerk makes a copy, the fee in N.J.S.A. 22A:2-29 applies. However, in the instant complaint now before the GRC, the records have been requested in electronic or microfilm format instead of paper format and as such N.J.S.A. 22A:2-29 does not apply. For the same reason, N.J.S.A. 47:1A-5.b. (enumerating the OPRA rates for paper copies) does not apply.
6. The parties should meet and agree on cost or if they are unable to so agree, they should each submit a brief to the GRC on the cost issue only and the GRC will refer such matter to the Office of Administrative Law. The parties shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.
7. The Custodian has not borne her burden of proving that redactions of the publicly recorded real estate records are necessary. Since redactions are not warranted, it is not likely the special service charge to which the Custodian attributed in large part to making redaction is warranted pursuant to N.J.S.A. 47:1A-5.c.
8. The Custodian should arrange to make the filing books available to the Complainant to make copies of the records requested using the public photocopy machine. The Custodian shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.
9. The Complainant's Counsel is required to submit to the GRC a written application for attorney's fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). The Complainant shall so comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. The GRC reserves the right to make the determination on the issue of prevailing party attorney's fees.

#### **July 19, 2006**

Council's Interim Order distributed to the parties.

#### **August 1, 2006**

Complainant's E-mail to the GRC. The Complainant e-mailed the Executive Director requesting a two (2) week extension for the parties to comply with the Council's Interim Order. Specifically, the parties needed additional time to reach a resolution on the cost issue referenced in Finding No. 6 of the Interim Order. Such request was granted.

#### **August 11, 2006**

Complainant's E-mail to the Custodian. The Complainant e-mailed the Custodian's Counsel requesting agreement to a request of the GRC for an additional two (2) week extension to resolve the cost issue referenced in Finding No. 6 of the Council's Interim Order.

#### **August 15, 2006**

Complainant's E-mail to the GRC. The Complainant e-mailed the Executive Director requesting an additional two (2) week extension for the parties to comply with the Council's Interim Order. Specifically, the parties needed additional time to reach a



resolution on the cost issue referenced in Finding No. 6 of the Interim Order. Such request was granted.

**September 1, 2006**

Complainant's E-mail to the GRC. The Complainant e-mailed a jointed certification signed by both parties that indicates:

- (1) the parties have met and mutually agreed on the cost issue (negating the need to refer the complaint to the Office of Administrative Law),
- (2) the parties have mutually agreed on an arrangement for the copying of filing books,
- (3) the parties have mutually agreed on a resolution concerning attorneys' fees (negating Complainant Counsel's need to submit an application for same to the GRC), and
- (4) the parties agreed on all other matters in dispute.

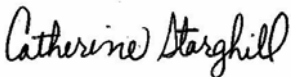
**Analysis**

**Whether the Custodian complied with the Council's July 13, 2006 Interim Order?**

Pursuant to the joint certification from the parties dated September 1, 2006, it may be determined that the parties have complied with the Council's July 13, 2006 Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the parties have complied with the Council's July 13, 2006 Interim Order.

Prepared By:   
Catherine Starghill, Esq.  
Executive Director

September 7, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Cynthia McBride<sup>7</sup>  
Complainant**

**GRC Complaint No. 2005-86**

**v.**

**Township of Hamilton<sup>8</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

An electronic copy of various municipal real estate tax records including the billing, payment, property identification, property location, deductions and lien information from the Township of Hamilton.

[It appears that the Complainant's company (Data Trace) partnered with Edmunds & Associates, Inc. (a company that creates computer software for the electronic maintenance and recording of municipal real estate tax records which is utilized by many municipalities in New Jersey) to create a software "bridge" allowing the easy export of these electronic municipal real estate tax records from the existing Edmunds' systems maintained by the municipalities to Data Trace's system. Additionally, it appears that at some time in the past, the Township of Hamilton's Tax Collector added the software bridge to her computer system to accommodate OPRA requests from Data Trace for the exact records subject to this complaint.]

**Request Made:** April 7, 2005

**Response Made:** April 12, 2005

**Custodian:** Joan Anderson (Municipal Clerk) and Renee DeSalvo (Tax Collector)

**GRC Complaint Filed:** April 28, 2005

**Background**

**April 7, 2005**

Complainant's Open Public Records Act ("OPRA") Request. The Complainant requests an electronic copy of various municipal real estate tax records including the billing, payment, property identification, property location, deductions and lien information from the Township of Hamilton.

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<sup>7</sup> Complainant represented by Yianni Pantis, Esq., an out-of-state attorney working in association with Ms. Mary Kay Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti LLP (Trenton, NJ).

<sup>8</sup> No legal representation on record.

**April 12, 2005**

Custodian's Initial Response to the OPRA Request. The Custodian (Tax Collector) e-mails the Complainant acknowledging receipt of the OPRA request within the seven (7) business days after the OPRA request and states that the fee for the electronic copy of the records requested is \$15.00. Further, the Custodian states that as soon as the check is received, the electronic file would be sent.

**April 12, 2005**

Complainant's E-mail to the Custodian. The Complainant states that her assistant could stop by the Custodian's office to add the computer software shortcut to the Custodian's computer desktop which will make transmitting the records electronically via e-mail a simple process. The Complainant explains that she [the Complainant] will be requesting these records under OPRA twice a week in the future and asked the Custodian if there were preferable days to make such OPRA request presumably to accommodate operational restraints in the Tax Collector's Office.

**April 13, 2005**

Custodian's Letter to the Complainant. The Custodian informs the Complainant that the check received for the requested records was being returned to the Complainant. The Custodian states that the Business Administrator directed the Custodian not to send the requested records (which were requested in electronic format) until the Business Administrator had an opportunity to review the electronic file to determine whether there was information contained therein requiring redaction and to determine the number of pages contained within the file. Further, the Custodian states that the Complainant would be charged for the number of pages contained in the electronic file in accordance with the Custodian's fee schedule (presumably the OPRA fees for paper copies of \$0.75/each for pages 1-10, \$0.50/each for pages 11-20 and \$0.25/each for pages 21 and more).

**April 19, 2005**

Complainant's E-mail to the Custodian. The Complainant states that she had not received the electronic file yet and asked the Custodian if there was a problem in fulfilling the OPRA request.

**April 19, 2005**

Complainant's Letter to the Custodian. The Complainant acknowledges receipt of the Custodian's April 13, 2006 letter. The Complainant requests clarification regarding why the electronic file was being reviewed to determine the number of pages contained therein and the anticipated determination of the charge for the request based on the number of pages provided in the electronic file. The Complainant states that she requested the records in the electronic format of the records maintained by the Custodian. As such, the Complainant asserts that the fees for paper copies do not apply to this request.

**April 21, 2005**

Custodian's E-mail to the Complainant. The Custodian reiterates that the Business Administrator directed the Custodian not to send the requested records (which were requested in electronic format) until the Business Administrator had an opportunity to review the electronic file. The Custodian states that there is a fee for preparing the electronic file for disclosure and that such fee was being determined based on the size of

the electronic file. Finally, the Custodian informs the Complainant that all future correspondence be directed to the Business Administrator.

**April 21, 2005**

Complainant's Letter to the Business Administrator. The Complainant asks the Business Administrator for information regarding the status of the request. The Complainant reiterates that the request was for an electronic file that may be easily exported (or e-mailed) via the computer software presently available on the Tax Collector's computer system. Further, the Complainant asserts that the electronic records requested are similar to the mortgage payment files that the Tax Collector creates and sends to several mortgage servicing agents. The Complainants states that the fee for this OPRA request should be comparable to the fee that another municipality (Township of Atlantic) is charging the Complainant for the same electronic data.

**April 26, 2005**

Complainant's Letter to the Business Administrator. The Complainant informs the Business Administrator that nine (9) business days have passed since she filed the OPRA request and the records have still not been provided. The Complainant requests a response to this letter and informs the Business Administrator that failure to communicate regarding this OPRA records request will be viewed as a denial of access.

**April 26, 2005**

Business Administrator's Denial of the OPRA Request. The Business Administrator acknowledges receipt of the OPRA request for an electronic file of the requested records which is maintained by the Custodian in such electronic format pursuant to the computer software utilized by the municipality and purchased from Edmunds.<sup>9</sup> The Business Administrator refutes the Complainant's claim that the Custodian has not provided a response to the request given the verbal and written communication that has ensued between the Custodian and the Complainant. Further, the Business Administrator denied the request for the following reasons:

1. The electronic file required special knowledge to open and the Custodian was just able to open it yesterday for review of the file's content.
2. The information contained in the file is in a format not easily read and requires some study to determine if any information should be redacted due to the exemption from disclosure for advisory, consultative or deliberative material and the public's reasonable expectation of privacy.
3. The Custodian is required by OPRA to review all 3,399 pages contained in the file and redact all information that is exempt from disclosure as advisory, consultative or deliberative material and the public's reasonable expectation of privacy.
4. Based on the foregoing, the Township of Hamilton does not choose to provide tax information in this medium.

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<sup>9</sup> Again, Edmunds & Associates, Inc. is a company that creates computer software for the maintenance and recording of municipal real estate tax records. Many municipalities in New Jersey utilize the Edmunds' systems.

The Business Administrator went on to state that the requested records could be provided using the conventional methods of providing such tax records (in paper format).

**April 28, 2005**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

1. April 7, 2005 – Complainant’s OPRA Records Request;
2. April 12, 2005 – Custodian’s Initial Response to the OPRA Request;
3. April 12, 2005 – Complainant’s E-mail to the Custodian;
4. April 13, 2005 – Custodian’s Letter to the Complainant;
5. April 19, 2005 – Complainant’s E-mail to the Custodian;
6. April 19, 2005 – Complainant’s Letter to the Custodian;
7. April 21, 2005 – Custodian’s E-mail to the Complainant;
8. April 21, 2005 – Complainant’s Letter to the Custodian;
9. April 26, 2005 – Complainant’s Letter to the Business Administrator; and
10. April 26, 2005 – Business Administrator’s Denial of Access to the OPRA Request.

The Complainant asserts that the requested record, in electronic format, qualifies as a government record under OPRA and there is no applicable exemption from disclosure under OPRA. Additionally, the Complainant asserts that the Custodian has been providing the identical records to the Complainant in paper format and that the Complainant is currently receiving the same records in electronic format from hundreds of other municipalities throughout New Jersey.

The Complainant also asserts that she is not asking the Custodian to perform a medium conversion since she is willing to accept the records in the electronic format routinely maintained by the Custodian. Further, the Complainant asserts that the Custodian has knowingly and willfully violated OPRA by denying the request in order to protect the Custodian’s revenue stream generated by charging the Complainant the OPRA copying rates for paper copies for the voluminous records request rather than charging the Complainant the actual cost of duplicating the records in electronic format which the Custodian originally stated was \$15.00.

**May 2, 2005**

Offer of Mediation sent to both parties.

**May 3, 2005**

Complainant’s Signed Mediation Agreement. The Complainant agreed to mediation.

**May 10, 2005**

Custodian’s Rejection of Mediation. The Custodian stated that she respectfully declined mediation despite the conversation she had with GRC staff.

**May 10, 2005**

GRC E-mail to the Custodian. GRC staff apologizes for the Custodian’s misunderstanding of a prior telephone conversation in which staff cited prior decisions of

the GRC in which the Complainant filed complaints and such complaints were administratively adjudicated because the parties settled and the Complainant received the records requested. Additionally, GRC staff states that every complaint is evaluated by the GRC on its own merits.

**May 11, 2005**

Custodian's Letter to the GRC. The Custodian declined mediation of this complaint.

**May 11, 2005**

Request for Statement of Information sent to the Custodian.

**May 17, 2005**

Custodian's Statement of Information ("SOI") with the following attachments:

1. April 7, 2005 – Complainant's OPRA Records Request;
2. April 12, 2005 – Custodian's Initial Response to the OPRA Request;
3. April 12, 2005 – Complainant's E-mail to the Custodian;
4. April 19, 2005 – Complainant's Letter to the Custodian;
5. April 21, 2005 – Complainant's Letter to the Custodian;
6. April 26, 2005 – Complainant's Letter to the Business Administrator;
7. April 26, 2005 – Business Administrator's Denial of Access to the OPRA Request;
8. April 28, 2005 – Complainant's Denial of Access Complaint (pages 3 and 4);
9. May 16, 2005 – Custodian's E-mail to the Business Administrator;
10. Three (3) example pages from the electronic file in question;
11. Printed photo of the pages contained in the electronic file in question spread on a conference room table;
12. New Jersey Tax Collectors' Association Opinion No. 2004-0002 entitled "Can A Municipality Allow An Outside Search Company Direct Access To Its Municipal Records?"; and
13. Various pages from Data Trace's website.

The Custodian asserts that the records request was denied for several reasons including because no one in the Tax Collector's Office could open the electronic file even with the assistance of Edmunds. Additionally, the Custodian asserts that Edmunds informed the Custodian that the electronic file could not be opened by the Custodian. The Custodian also asserts that when the Custodian was able to open the electronic file, with assistance from a previous Edmunds employee now employed by the Township of Hamilton, it was determined that the file contained 3,400 pages that is not in a format the Custodian uses and the records were not easy to read.

The Custodian further asserts that the records contained in the file have information that the Custodian is required under OPRA to redact due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that given the volume of the records contained in the electronic file and required to be reviewed for appropriate redactions, special accommodations (presumably a special service charge) are required.

Also, the Custodian asserts that the New Jersey Tax Collectors' Association Opinion No. 2004-0002 states that it is legal to provide tax information in electronic format, however it is not mandatory. Additionally, the Custodian reiterates the offer to provide the requested records using conventional methods. Further, the Custodian asserts that safeguards should be in place to ensure that the Complainant may only view the information and not alter it.

The Custodian states that the above-referenced Opinion mandates that if Tax Collectors participate in this type of information sharing, they do so in a nondiscriminatory manner. The Custodian asserts that the requested electronic file that the Complainant requested is only accessible to the Complainant and therefore cannot be provided to others in a nondiscriminatory manner.

Finally, the Custodian asserts that the Complainant is a commercial user of the records requested and that the Township of Hamilton may be required to auction these records to the highest bidder to ensure that it receives fair compensation for these "assets".

#### **May 25, 2005**

Letter of Representation from Yianni Pantis to the GRC. Mr. Pantis (an attorney barred out-of-state) indicates that he represents the Complainant *pro hac vice* pursuant to N.J.A.C. 1:1-5.2. Mr. Pantis is working in association with Ms. Mary Kay Roberts, Esq. of the New Jersey firm of Riker, Danzig, Scherer, Hyland & Perretti LLP (Trenton, NJ).

#### **June 10, 2005**

Complainant's Response to the Custodian's Statement of Information. The Complainant's Counsel rebuts the Custodian's reasons for denial as follows:

Reasons 1 & 2: *No one in the Custodian's office could initially open the requested electronic file and when opened, the information was not easily readable because the Custodian does not use the records in the format of the electronic file in question.*

The Complainant asserts that the Custodian was ultimately able to open the file and the fact that the Custodian does not "use" the records in the electronic format of the file is irrelevant. Counsel further asserts that the relevant issue for access to government records under OPRA (N.J.S.A. 47:1A-5.d.) is that the Custodian "maintain" the records in the electronic format requested. In this instance, the Custodian does in fact maintain the records in the electronic format requested by Complainant.

Reason 3: *When opened, the information contained information the Custodian is required to redact due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.*

The Complainant states that the redacted copies of a sampling of the records requested (included with the Custodian's Statement of Information) show only the loan numbers redacted. The Complainant asserts that the loan numbers appear on every recorded mortgage filed with the county clerk and is still thus a public record. Additionally, the Complainant asserts that she [the Complainant] routinely receives

electronic copies of these records from other New Jersey jurisdictions without any redactions. Further, the Complainant asserts that the Custodian has never redacted any information on the same records provided to her [the Complainant] in paper format. Lastly, the Complainant asserts that the New Jersey Tax Collectors' Association Opinion No. 2004-0002 supports the fulfillment of this request in electronic format without any redactions specifically stating that there is nothing secretive about delinquencies as to a particular piece of real estate owned by an individual within any town. The Complainant further cited the opinion as stating that "there is nothing secretive about the information that would require a municipality to safeguard it from the public. Therefore, it is the opinion of the undersigned that search companies should continue to have access to information in the tax collector's office as they did prior to the enactment of the OPRA."

*Reason 4: The volume of records that require review for determination of redactions due to the exemption from disclosure for advisory, consultative or deliberative material is extraordinary and requires special accommodation.*

The Complainant asserts that no redactions are necessary as discussed above but even if there was, the Custodian cannot deny the entire request because redactions are necessary. The Complainant further asserts that OPRA requires the Custodian to fulfill the request with any necessary redactions pursuant to N.J.S.A. 47:1A-5.a.<sup>10</sup>

*Reason 5: According to the New Jersey Tax Collectors Association Opinion No. 2004-0002, it is legal to provide tax information in electronic format, but not mandatory, as long as a Tax Collector does so in a nondiscriminatory manner.*

The Complainant asserts that the New Jersey Tax Collectors Association Opinion No. 2004-0002 supports the fulfillment of this request in electronic format. Specifically, the Complainant asserts that the above-mentioned opinion discusses "direct access" to a municipality's records by tying in the requestor's computer to the municipality's computer through a separately installed computer software program.

Contrary to the "direct access" allowed pursuant to the above-mentioned opinion, the Complainant asserts that she simply wants the electronic file copy of the records requested e-mailed to her. Further, the Complainant asserts that if the Custodian were allowed to deny access to the requested records because no one other than the Complainant can open the electronic file in question, then there would be absolutely no right of access to public records.

*Reason 6: The Township must auction the requested public records to the highest bidder to ensure that the Township receives fair compensation for such assets.*

The Complainant asserts that the true reason for the denial of this request from a commercial user like Data Trace is based on the Custodian's loss of anticipated revenue by disclosing the electronic file for \$15.00 versus charging the OPRA rates for paper copies of the voluminous request. The Complainant also asserts that the Custodian has

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<sup>10</sup> N.J.S.A. 47:1A-5.a. provides that "... [p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person ..."



no authority to discriminate on the basis of the requestor's intended use of public records. Additionally, the Complainant asserts that commercial requestors are members of the public and have the same rights under OPRA as all other requestors. Further, the Complainant asserts that the Custodian's portrayal of the requested records as "assets" that need to be sold to the highest bidder is frivolous and approaches bad faith. In fact, the Complainant asserts that these public records are owned by the people and not the Custodian. Lastly, the Complainant asserts that the above-mentioned opinion of the New Jersey Tax Collectors Association acknowledges that Tax Collectors should encourage requests similar to that of the Complainant because in the long run the municipalities will receive fewer requests<sup>11</sup> for information and there will be no liability for misinformation with the reduction in certified searches requested of the same records.

### **July 6, 2005**

Custodian's Response to the Complainant's Letter dated June 10, 2005. The Custodian responds to the Complainant's rebuttal of the reasons for denial as follows:

Reasons 1 & 2: *No one in the Custodian's office could initially open the requested electronic file and when opened, the information was not easily readable because the Custodian does not use the records in the format of the electronic file in question.*

The Custodian asserts that because the electronic file could not be easily opened and once opened could not be easily read since the data is in a format not compatible with the Custodian's word processing software nor can be duplicated for other members of the public if requested, fulfilling the request violates the basic tenant of OPRA which ensures the public's right of access be construed in the public's favor.

The Custodian also asserts that Data Trace surreptitiously installed the Edmunds' software that creates the bridge between the Custodian's tax records system with Data Trace's system. The Custodian asserts that he did not intend to allow a process that would gather all of the Township's tax data into one file so that only one commercial user could access the information thus resulting in a proprietary arrangement with Data Trace. Further, the Custodian asserts that Data Trace is using OPRA to champion its position as the sole beneficiary of the information while others who may wish to gain access to the data are discriminated against.

Reason 3: *When opened, the information contained information the Custodian is required to redact due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.*

The Custodian asserts that the staff of the Tax Collector's Office have included notes in the tax records which may refer to late payments, bounced checks, phone numbers (some unlisted) and loan numbers which are exempt from disclosure as advisory, consultative or deliberative material. Further, the Custodian states that the Township of Hamilton will not acquiesce to the request simply because other municipalities have done so. Lastly, the Custodian agrees with the Complainant's

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<sup>11</sup> Presumably because the large search companies will make requests for the electronic files of all the tax records and the individual requestors will go to the search companies instead of all making individual requests of the municipalities.

assertion that there have been no redactions to paper copies of the tax records provided to the Complainant in the past by the Custodian. However, the Custodian qualifies such agreement by asserting that those paper copies were not the entire tax record database and such database may require redactions or at least review to determine if redactions are necessary.

Reason 4: *The volume of records that require review for determination of redactions due to the exemption from disclosure for advisory, consultative or deliberative material is extraordinary and requires special accommodation.*

The Custodian asserts that this reason remains valid despite the Custodian's agreement that there have been no redactions to paper copies of the tax records provided to the Complainant in the past by the Custodian.

Reason 5: *According to the New Jersey Tax Collectors Association Opinion No. 2004-0002, it is legal to provide tax information in electronic format, but not mandatory, as long as a Tax Collector does so in a nondiscriminatory manner.*

The Custodian asserts that providing the requested records by conventional methods (i.e. paper copies) as done for the Complainant in the past is not a deviation from the above-mentioned opinion. Additionally, the Custodian asserts that providing the electronic file to the Complainant would be discriminatory toward all other requestors because the electronic file is only readable by Data Trace.

Reason 6: *The Township must auction the requested public records to the highest bidder to ensure that the Township receives fair compensation for such assets.*

The Custodian asserts the denial of the request was based in part on N.J.S.A. 40A:11-36 which requires the Custodian to sale personal property valued greater than \$2,500 to the highest bidder. The Custodian determines that the requested records are valued greater than \$2,500 because the estimated market value of the real estate tax searches Data Trace provides its consumers at \$20 – \$30/each for over 16,000 line items contained in the electronic file is far greater than \$2,500.

### **August 3, 2005**

Letter from Custodian to the GRC with the following attachment:

- July 28, 2005 – Letter from the Atlantic County Tax Administrator to the all Atlantic County Tax Assessors.

The Custodian submits a copy of a letter from the Atlantic County Tax Administrator in which the Tax Administrator cautions County Tax Assessors about providing assessment information in light of the alarming increase in identity theft. The Custodian asserts that this letter is corroborating evidence for the Custodian's denial of access due to the information that must be redacted as advisory, consultative, or deliberative material. Further, the Custodian asserts that the release of the entire database of tax information without first examining each record for information that is not considered public under OPRA and which may compromise a taxpayer's reasonable expectation of privacy (leading to identity theft) is contrary to the law.

**August 23, 2005**

Complainant's Response to the Custodian's Letters dated July 6 and August 3, 2005 with the following attachment:

- August 16, 2006 – Letter from Edmunds & Associates, Inc. to the Complainant.

The Complainant rebuts the Custodian's claims that releasing public assessment information (municipal real estate tax records) in electronic format (as opposed to paper format) will cause a myriad of problems, including identity theft. Specifically, the Complainant asserts that the enclosed letter from Edmunds explains that of the two comment/remark fields that exist in the requested tax records, only one (the smallest one containing two lines of twenty-five (25) characters) is accessible in the electronic file requested by the Complainant. The Complainant further asserts that the larger comment/remark field is only accessible to the Custodian. Lastly, the Complainant asserts that the Custodian would only enter confidential information in the larger comment/remark field that is only accessible by the Custodian and not included in the electronic file requested by the Complainant.

The Complainant requests that the GRC order:

1. the Custodian to provide the records requested in electronic format as requested for \$15.00 (which is the initial charge the Custodian stated); and
2. the Custodian to reimburse the Complainant for reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

Additionally, the Complainant requests that the GRC not accept any further submissions regarding this matter in an effort to expedite the GRC's decision in this matter.

**August 29, 2005**

Custodian's Response to the Complainant's Letters dated August 23, 2005. The Custodian asserts that his letter dated August 3, 2005 provides corroboration that local tax officials must be cautious when providing tax information to requestors. The Custodian also asserts that notes made by a Tax Collector on real estate tax records are clearly deliberative material and the Complainant's argument that such deliberative notes should be made in the larger comment/remark field of the records (which is not included in the electronic file requested by the Complainant) does not negate the necessity for the Custodian to review such records to determine that no deliberative material was also included in the smaller comment/remark field which is included in the electronic file in question thus requiring redactions.

Additionally the Custodian asserts that while the information previously provided to the Complainant in paper format had no information requiring redactions does not mean that there are no instances in which such records must be appropriately redacted. The Custodian further asserts that only an examination of each record can confirm that no redactions are required under OPRA.

Lastly, the Custodian asserts that the tax records constitute a database that is the property or an asset of the taxpayers which requires the Custodian to manage according to N.J.S.A. 40A:11-36 and auction the asset (i.e. the records) to the highest bidder.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, *maintained or kept on file ... or that has been received* in the course of his or its official business ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested *if the public agency maintains the record in that medium...*” (Emphasis added.) N.J.S.A. 47:1A-5.d.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, *a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA also provides that:

“[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access *and shall promptly permit access to the remainder of the record...*” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

In the complaint at hand, the Custodian initially responded to the Complainant within the seven (7) business days statutorily mandated under OPRA by indicating that access would be granted for a charge of \$15. Subsequently (one day later), the Custodian informed the Complainant that the check received for \$15 would be returned and that the Business Administrator needed to review the records contained in the electronic file to ensure that no information requiring redaction under OPRA due to the exemption from disclosure for advisory, consultative or deliberative material is contained therein. Further in this subsequent communication, the Custodian informed the Complainant that the charge for the records would be consistent with that for paper copies of records, instead of the electronic format charge previously stated as \$15.

The Custodian formally denied access to the request nine (9) business days after receiving it for the reasons asserted above and because the Custodian asserts that disclosing the requested record in electronic format results in discriminatory information sharing in violation of a formal opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires that the Custodian auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets.

The Complainant asserts that the requested record, in electronic format, qualifies as a government record under OPRA and there is no applicable exemption from disclosure under OPRA. Additionally, the Complainant asserts that the Custodian has been providing the identical records to the Complainant in paper format without any redactions for information exempt from disclosure as advisory, consultative or deliberative material and that the Complainant is currently receiving the same unredacted records in electronic format from hundreds of other municipalities throughout New Jersey.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

#### Timeliness & Medium Requested

OPRA also provides that unless a shorter time period is otherwise provided by statute, regulation, or executive order, *a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request.* N.J.S.A. 47:1A-5.i. While the Custodian did initially grant access to the Complainant

within the statutorily mandated seven (7) business days, the Custodian then subsequently denied access on the ninth business day after receiving the request. This denial of access on the ninth business day after receiving the request is a violation of OPRA. Therefore, the Custodian has unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that a custodian shall permit access to a government record and provide a copy thereof *in the medium requested if the public agency maintains the record in that medium*. N.J.S.A. 47:1A-5.d. Since the Custodian has admitted to maintaining the requested record in the medium requested, it is clear that the Custodian is required to provide a copy of the requested record in such medium pursuant to N.J.S.A. 47:1A-5.d. As such, the Custodian has violated OPRA by refusing to give the Complainant the requested electronic file copy which the Custodian does maintain pursuant to N.J.S.A. 47:1A-5.d. The Custodian's offer of providing the Complainant the requested records in paper format in lieu of the requested electronic file maintained by the Custodian is not acceptable under OPRA.

### Redactions

The exclusion from the definition of a government record under OPRA for information that is advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., and thus the Custodian's requirement to redact the same is not a lawful basis for denying access to the *entire record* pursuant to N.J.S.A. 47:1A-5.g. The Custodian's assertion that exempt information must be redacted is correct however the Custodian unlawfully denied access to the requested records when those records were not made available to the Complainant with the appropriate redactions pursuant to N.J.S.A. 47:1A-5.g. It is unclear however why there would be any redactions necessary to the requested records when even the New Jersey Tax Collectors Association proclaims that "there is nothing secretive or confidential about delinquencies as to a particular piece of real estate owned by an individual within any town. Therefore, this information is a public record which can be accessed by anyone from the general public."<sup>12</sup>

In any event, if there is any information in the requested records requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., then such redactions should be made before providing the records to the Complainant. The Custodian should make the redactions in accordance with the legal standard set forth in OPRA and by the Courts.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude, from the definition of a government record, the types of documents that are the subject of the "deliberative process privilege." That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information

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<sup>12</sup> New Jersey Tax Collectors Association, Opinion No. 2004-0002 "Can A Municipality Allow An Outside Search Company Direct Access To Its Municipal Records?", Keith A. Bonchi, Associate Counsel.

Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. In re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

(1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.

- a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
- b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
- c. Deliberative materials do not include purely factual materials.
- d. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
- e. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
- f. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
- g. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

(2) Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of the importance of the information to the requesting party, its availability from other sources and the effect of disclosure on frank and independent discussion of contemplated government policies.

#### Discriminatory Information Sharing & Auctioning of Government Records

Lastly, the Custodian’s assertions that disclosing the requested record in electronic format results in discriminatory information sharing in

violation of a formal opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires the Custodian to auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to N.J.S.A. 40A:11-36 are misplaced in reference to the Custodian's legal obligations under OPRA.

OPRA clearly states in its Legislative findings that "government records shall be readily accessible for inspection, copying, or examination by the citizens of the State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access..." N.J.S.A. 47:1A-1. The Custodian's statutory mandate to provide records to a requestor in the medium requested does not appear to conflict with the New Jersey Tax Collectors Association directive not to engage in discriminatory information sharing. In this case, discriminatory information sharing would result if the Custodian refused to provide the same records to any other requestor. Even the Custodian does not refute that the same records, in a different format (i.e. paper copies), is currently being provided to other requestors including the Complainant. Therefore, the assertion that providing the requested records in the electronic format requested by the Complainant is discriminatory is misplaced.

Additionally, the Custodian's assertion that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires that the Custodian auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to N.J.S.A. 40A:11-36 is also misplaced.

The New Jersey statute referenced by the Custodian as obliging him to auction government records is the local public contracts law and provides that "any contracting unit by resolution of its governing body may authorize by sealed bid or public auction the sale of its personal property not needed for public use." N.J.S.A. 40A:11-36. While OPRA provides that other state statutes may supersede the access allowed under OPRA, the local public contracts law is not one of them since that law does not even address access to government records. Additionally, it is unlikely: (1) that government records could ever be deemed "personal property" of a municipality, (2) that government records is "not needed for public use", or (3) that the Custodian could obtain a resolution from its governing body to authorize a public auction of the requested records. Thus, the local public contracts law cited by the Custodian as requiring the requested records be auctioned to the highest bidder is not applicable to the denial of access complaint now before the GRC.

**Whether a special service charge is warranted to accommodate the Custodian's review of the requested records for required redactions**



**of information exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1?**

OPRA provides that:

“[w]henever the...volume of a government record embodied in the form of printed matter to be...copied pursuant to [OPRA] is such that the record...involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies...The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added.)  
N.J.S.A. 47:1A-5.c.

The Custodian asserts that “special accommodation” is required to review the asserted 3,400 pages contained in the electronic file requested to ensure that those records do not contain any information requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an extraordinary expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. The GRC has established criteria for evaluating a special service charge in Janon Fisher v. Division of Law and Public Safety, GRC Complaint No. 2004-55 (December 2004). In order for the GRC to determine whether a special service charge is warranted, the Custodian must provide a response to the following questions:

1. The volume, nature, size, number, of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination, and,
6. The amount of time required to return documents to their original storage place,
7. The size of the agency,
8. The number of employees available to accommodate documents requests,
9. The availability of information technology and copying capabilities,
10. What was requested,
11. The level(s) of skill necessary to accommodate the request,
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above,
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents, and
14. Who in the agency will perform the work associated with each request?

In Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Appellate Division held that it would be appropriate to

calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the Custodian can prove that the professional level of human resource was needed to fulfill the request.

Therefore, pursuant to N.J.S.A. 47:1A-5.c. and Lenape, supra, the Custodian must borne the burden of proving that a special service charge is warranted in this case by providing responses to the questions listed above. However, the special service charge should only reflect the hours spent reviewing the records for exempt information and the hourly rate (minus the fringe benefits) of appropriate personnel utilized.

**Whether the enumerated copying rates for paper copies provided in OPRA are applicable to this request?**

OPRA provides that:

“[a] copy or copies of a government record may be purchased *by any person* upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost of duplicating the record*. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page. *Actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c.* [concerning special service charges]. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added.) N.J.S.A. 47:1A-5.b.

Initially, the Custodian informed the Complainant that the charge for the requested electronic file copy of the records would be \$15. Later, the Custodian asserts that the enumerated copying rates for government records “embodied in the form of printed matter” pursuant to N.J.S.A. 47:1A-5.b. will be used as the charge for the requested records in electronic format. The Complainant, in turn, asserts that the charge for the requested electronic file should be the \$15 originally determined by the Custodian and that the enumerated copying rates provided in OPRA for paper copies do not apply to this request.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. In Libertarian Party of Central New Jersey and John T. Paff v. Township of Edison, 384 N.J. Super. 136 (App. Div., March 2006), the plaintiffs argued that the copying fee of \$55 for the requested record (Council meeting minutes on CD-Rom) was unreasonable and did not reflect the municipality's actual cost to duplicate the records in violation of N.J.S.A. 47:1A-5.b. The appellate court agreed. That court

held that as it was undisputed that the actual cost of the diskette requested was far less than \$55 charged by the custodian in accordance with a municipal ordinance, the only discernable rationale for the fee was to discourage the public from requesting the information in this format. Such a policy was not legally sustainable. The court further held that the imposition of a facially inordinate fee placed an unreasonable burden on the right of access guaranteed by OPRA, and violated the principle set by N.J.S.A. 47:1A-5.b. that the fee should reflect actual cost of duplication.

The actual cost of providing the Complainant with the requested *electronic* file that is admittedly maintained by the Custodian is definitely not the enumerated copying rates for paper copies provided in OPRA and is probably less than the \$15 originally determined by the Custodian and in fact had previously mailed a check to the Custodian for that amount. However, the Complainant has not objected to the \$15 cost originally determined by the Custodian. Therefore, the Custodian should provide the requested electronic file to the Complainant for the cost it originally determined as the duplication fee for the requested electronic record.

Please note that this cost is separate from the reasonable special service charge that may be charged by the Custodian for the extraordinary time and effort that may be determined as warranted for the review of the records contained in the electronic file to ensure that redactions are made for information exemption from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

### **Whether the Complainant is entitled to prevailing party attorney's fees under OPRA?**

OPRA provides that:

“... [i]f it is determined that access has been improperly denied, the court or agency [GRC] head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

New Jersey adheres to the strong policy that each litigant bears his own counsel fees, except in those situations specifically designated by statute or court rule. In re Niles, 176 N.J. 282, 293-94 (2003); North Bergen Rex Transport v. TLC, 158 N.J. 561, 569 (1999). OPRA contains such an exception to the general rule; it provides that a "requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6 and 47:1A-7.f.

OPRA permits a requestor to challenge a custodian's denial of access by filing a complaint with either the Superior Court or the GRC. N.J.S.A. 47:1A-6. This section of the statute further states “[i]f it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to reasonable attorneys fees.” *Id.*

The following section of OPRA sets forth the authority of the GRC. After expressly empowering the GRC to render final decisions regarding access to a record, N.J.S.A. 47:1A-7.e., the statute reiterates that a requestor who prevails in a GRC proceeding is entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-7.f.

It is significant that the statutory authorization for attorney's fee awards immediately follows the sentence which provides that a court or the GRC shall issue an order requiring access if it determines that access has been improperly denied. N.J.S.A. 47:1A-6. This indicates an intent to link the two concepts. Nothing else in the statute suggests a contrary intent. Fee-shifting statutory provisions are strictly construed "in light of the general policy disfavoring the award of attorney's fee." North Bergen Rex Transport, supra, 158 N.J. at 570. Accordingly, we construe OPRA as permitting an attorney's fees award only in cases where the GRC has issued an order determining that access was improperly denied.

In the instant complaint, the Complainant's Counsel is required to submit to the GRC a written application for attorney's fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). The application should include, but not be limited to, a detailed description of the services rendered with the corresponding time expended for each service. Additionally, the GRC requests copies of weekly time sheets for each attorney or other staff in 0.1 time increments (6 minutes) and evidence that the rates charged are in accordance with prevailing market rates in the relevant legal community. The GRC will then review that application to determine whether the fees requested are reasonable pursuant to OPRA. The GRC reserves the right to make the determination on the issue of prevailing party attorney's fees after all other issues are resolved.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The denial of access on the ninth business day after receiving the request is a violation of OPRA. Therefore, the Custodian has unlawfully denied access to the requested records in electronic format pursuant to N.J.S.A. 47:1A-5.i.
2. Since the Custodian has admitted to maintaining the requested record in the medium requested, it is clear that the Custodian is required to provide a copy of the requested record in such medium pursuant to N.J.S.A. 47:1A-5.d. As such, the Custodian has violated OPRA by refusing to give the Complainant the requested electronic file copy which the Custodian does maintain pursuant to N.J.S.A. 47:1A-5.d. The Custodian's offer of providing the Complainant the requested records in paper format in lieu of the requested electronic file maintained by the Custodian is not acceptable under OPRA.
3. The Custodian's assertion that exempt information must be redacted is correct however the Custodian unlawfully denied access to the requested records when those records were not made available to the Complainant with the appropriate redactions pursuant to N.J.S.A. 47:1A-5.g.
4. If there is any information in the requested records requiring redaction due to the exemption from disclosure for advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., then such redactions should be made before providing the records to the Complainant. The Custodian should make

the redactions in accordance with the legal standard set forth in OPRA and by the Courts.

**The Custodian shall disclosure such records within a reasonable time given the volume of the records requested not to exceed twenty (20) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of such disclosure to the Executive Director. [This Order will become effective after the GRC approves the special service charge assessed by the Custodian in #6 below.]**

5. The Custodian's assertions that disclosing the requested record in electronic format results in discriminatory information sharing in violation of a formal opinion written by the New Jersey Tax Collectors Association and that the value of the records to the Complainant (in terms of the revenue the Complainant may receive by selling the records to its commercial costumers) requires the Custodian to auction the records to the highest bidder to ensure that the municipality receives fair compensation for its assets pursuant to N.J.S.A. 40A:11-36 are misplaced in reference to the Custodian's legal obligations under OPRA.
6. Pursuant to N.J.S.A. 47:1A-5.c. and Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Custodian must borne the burden of proving that a special service charge is warranted in this case. However, the special service charge should only reflect the hours spent reviewing the records for exempt information and the hourly rate (minus the fringe benefits) of appropriate personnel utilized.

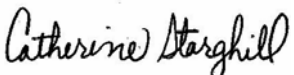
**The Custodian shall provide the GRC with the amount of the special service charge assessed and answers to the fourteen (14) questions the GRC uses to evaluate a special service charge as established in Janon Fisher v. Division of Law & Public Safety, GRC Complaint No. 2004-55 (December 2004) within ten (10) business days from receipt of the Council's Interim Order.**

7. The Custodian should provide the requested electronic file to the Complainant for the cost it originally determined as the duplication fee for the requested electronic record.

Please note that this cost is separate from the reasonable special service charge that may be charged by the Custodian for the extraordinary time and effort that may be determined as warranted for the review of the records contained in the electronic file to ensure that redactions are made for information exemption from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

8. The Complainant's Counsel is required to submit to the GRC a written application for attorney's fees supported by an attorney affidavit of service pursuant to New Jersey Court Rule 4:42-9(b). The Complainant shall so

comply within ten (10) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director. The GRC reserves the right to make the determination on the issue of prevailing party attorney's fees after all other issues are resolved.

Prepared By:   
Catherine Starghill, Esq.  
Executive Director

September 13, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**David Herron<sup>13</sup>  
Complainant**

**GRC Complaint No. 2005-130**

**v.**

**Montclair Community Pre-K Center<sup>14</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy for review of the annual budget for the Montclair Community Pre-K Center.
2. Copy for review and list of salaries for all employees of the Community Pre-K Center.

**Request Made:** June 3, 2005

**Response Made:** No Response

**Custodian:** Eve Robinson

**GRC Complaint Filed:** June 30, 2005

**Background**

**August 10, 2006**

Government Records Council's ("Council") Interim Order. At its August 10, 2006 public meeting, the Council considered the August 3, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. In consideration of all of these characteristics of the Pre-K taken together, the Pre-K is a public agency as provided for under OPRA and is obligated under the provisions of OPRA, including the provision which requires public agencies to create an official OPRA records request form (N.J.S.A. 47:1A-5.f.).
2. Since the Pre-K is a public agency under OPRA, the Custodian has unlawfully denied access to government records pursuant to OPRA. Thus, the Custodian should release the requested salaries of employees to the Complainant. The Custodian shall so comply within ten (10) business days

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<sup>13</sup> There is no legal representation of record.

<sup>14</sup> The Custodian is represented by Robert Goodsell of Post, Polak, Goodsell, MacNeill & Strauchler, P.A. (Roseland, New Jersey).

from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.

**August 15, 2006**

Council's Interim Order distributed to the parties.

**August 23, 2006**

Custodian's response to the Council's Interim Order. The Custodian copied the Executive Director of a letter addressed to the Complainant with an enclosure of the requested record.

**August 29, 2006**

Custodian's Certification of Compliance with the Council's Interim Order. The Custodian legally certified that she complied with the Council's August 10, 2006 Interim Order.

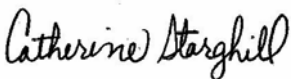
**Analysis**

**Whether the Custodian complied with the Council's August 10, 2006 Interim Order?**

Pursuant to the Custodian's letter to the Complainant dated August 23, 2006 with the enclosure of the requested record and the Custodian's legal certification to the Executive Director asserting to her compliance with the Council's August 10, 2006 Interim Order, it may be determined that the Custodian did comply with such Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has complied with the Council's August 10, 2006 Interim Order.

Prepared By:   
Catherine Starghill, Esq.  
Executive Director

September 7, 2006



**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**D.T.<sup>15</sup>  
Complainant**

**GRC Complaint No. 2005-203**

**v.**

**Rockaway Township Board of  
Education<sup>16</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

All legal costs related to DT [parent name] on behalf of AT [student name] v. Rockaway Board of Education regarding the July 19<sup>th</sup> due process hearing, including attorney fees, salary of witnesses, and any related expenses.

**Request Made:** October 13, 2005

**Response Made:** None

**Custodian:** Dr. James P. Verbist

**GRC Complaint Filed:** October 26, 2005

**Background**

**August 10, 2006**

Government Records Council's ("Council") Interim Order. At its August 10, 2006 public meeting, the Council considered the July 27, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that given the inconsistencies in the submissions by the parties, this complaint should be referred to the Office of Administrative Law for fact finding and legal conclusions consistent with the law outlined in the Findings and Recommendations on the following issues:

1. Whether the Custodian unlawfully denied access to the records requested on October 13, 2005?
2. Whether the Custodian properly responded to the Complainant's October 13, 2005 request in a timely manner?
3. Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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<sup>15</sup> No attorney on record.

<sup>16</sup> The Custodian is represented by Anthony Sciarrillo, Esq. (Westfield, NJ).

**August 18, 2006**

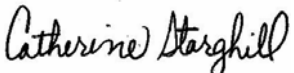
Complainant's Letter to the Council. The Complainant voluntarily withdrew the complaint because of the cooperation received from the new superintendent of schools.

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint is no longer ripe for adjudication since the Complainant voluntarily withdrew the complaint pursuant to a letter to the Council dated August 18, 2006.

Prepared By:   
Catherine Starghill, Esq.  
Executive Director

September 7, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Jane Cowley<sup>17</sup>  
2006-45  
Complainant**

**GRC Complaint No.**

**v.**

**Township of Kingwood<sup>18</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Township Committee meeting minutes from October 2003 through October 2004 in any form including audio tape or handwritten notes.
2. All Department of Environmental Protection (DEP) Notices of Violation and Letters of Interpretation from January 2002 to the present on all township properties.<sup>19</sup>

**Request Made:** October 7, 2004 and October 20, 2004

**Response Made:** October 14, 2004 and October 28, 2004

**Custodian:** Mary MacConnell

**GRC Complaint filed:** February 20, 2006

**Background**

**October 7, 2004**

Complainant's Open Public Records Act ("OPRA") request. The Complainant is seeking Township Committee meeting minutes from October 2003 through October 2004 in any form including audio tape or handwritten notes.

**October 14, 2004**

Custodian's response to the Complainant's October 7, 2004 OPRA request. The Custodian asserts that the Township is not legally required to tape meetings and therefore there are some meetings for which no tapes exist. She claims that any tapes or handwritten notes that do exist are not available as public information and are considered a tool the Custodian uses to prepare the minutes. The Custodian also claims that the minutes do not become public information until they are adopted by the governing body. She states that if the Complainant would like copies of approved minutes in the future, she would be happy to advise the Complainant as to when they would become available.

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<sup>17</sup> No legal representation of record listed.

<sup>18</sup> Represented by Joseph Novak, Esq. (Clinton, NJ).

<sup>19</sup> The Complainant requested additional documents; however, they are not the subject of this complaint.

**October 20, 2004**

Complainant's second OPRA request. The Complainant is seeking all Department of Environmental Protection (DEP) notices of Violation and Letters of Interpretation from January 2002 to the present on all Township properties.

**October 28, 2004**

Custodian's response to the Complainant's October 20, 2004 OPRA request. The Custodian states that the requested Notices of Violation, Applications and Letters of Interpretation for properties in the Township are available at the Municipal Building, Monday through Friday from 9:00am – 3:00pm. She also states that it would be helpful for the Complainant to contact her a day before she plans to come in as some of the responsive documents have to be retrieved from another location.

Additionally, the Custodian indicates that the requested information can also be accessed from the NJ DEP's website at [www.state.nj.us/dep](http://www.state.nj.us/dep). She includes step by step instructions on how to access the requested information through the website.

**February 20, 2006**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Letter from the Custodian to the Complainant dated September 7, 2004
- Complainant's October 7, 2004 OPRA request
- Letter from Custodian to the Complainant dated October 14, 2004
- Complainant's October 20, 2004 OPRA request
- Letter from Custodian to Complainant dated October 28, 2004

The Complainant asserts that she submitted an OPRA request for copies of the Township Committee meeting minutes from October 2003 through October 2004. She claims that the Custodian denied her request by stating that the minutes are not completed because the Township is too busy and she cannot access the minutes in any other format. Additionally, the Complainant asserts that she submitted another OPRA request for DEP Letters of Interpretation and Notices of Violation. She claims that the Custodian advised her that the requested records are only available at the Township Building, but then advised that the Complainant could access the same records on the DEP's website.

**February 22, 2006**

Offer of Mediation sent to both parties.

**February 28, 2006**

Custodian's faxed Agreement to Mediate. The Complainant did not agree to mediate this case.

**April 4, 2006**

Request for Statement of Information sent to the Custodian.

**April 4, 2006**

Letter from Custodian to GRC staff. The Custodian states that on February 28, 2006 she faxed her Agreement to Mediate to GRC staff and inquires as to why a mediation meeting has not been scheduled. She also states that the Township offices will

be closed from April 6, 2006 to April 10, 2006 due to renovation of the building and requests an extension of time to prepare the Statement of Information.

#### **April 17, 2006**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 23, 2004
- Complainant's OPRA request dated August 24, 2004
- Complainant's OPRA request dated October 20, 2004
- Letter from Custodian to Complainant dated September 7, 2004
- Letter from Custodian to Complainant dated October 14, 2004
- Letter from Custodian to Complainant dated October 28, 2004

The Custodian certifies that she received the Complainant's various OPRA requests on August 23, 2004, August 24, 2004, and October 20, 2004. She certifies that she provided the Complainant with written responses to said requests on September 7, 2004, October 14, 2004, and October 28, 2004. The Custodian additionally certifies that the following requested documents were provided to the Complainant:

- Construction Permit File for Block 26 Lot 6

- Planning Board Minutes:

- January 14, 2003
- February 11, 2003
- March 11, 2003
- April 8, 2003
- May 13, 2003
- June 10, 2003
- July 8, 2003
- August 12, 2003
- September 9, 2003
- October 14, 2003
- November 10, 2003
- December 9, 2003
- January 13, 2004
- February 10, 2004
- March 9, 2004
- April 13, 2004
- May 11, 2004
- June 8, 2004
- July 13, 2004
- August 10, 2004
- September 14, 2004
- October 12, 2004
- November 12, 2004
- December 14, 2004

- Township Committee Minutes:

- January 1, 2003
- January 7, 2003
- February 4, 2003
- March 3, 2003
- March 4, 2003

- April 1, 2003
- April 28, 2003
- May 6, 2003
- May 13, 2003
- May 27, 2003
- June 3, 2003
- June 11, 2003
- June 23, 2003
- July 1, 2003
- July 18, 2003
- August 5, 2003
- September 2, 2003
- September 22, 2003
- Township Ordinances:
  - No. 12-10-2003
  - No. 12-11-2003
  - No. 12-13-2003
  - No. 12-1-2004
  - No. 12-2-2004
  - No. 12-3-2004
  - No. 12-4-2004
  - No. 12-5-2004
  - No. 12-6-2004
  - No. 12-7-2004
  - No. 12-8-2004
  - No. 12-9-2004
  - No. 12-10-2004
  - No. 12-11-2004
  - No. 12-12-2004
  - No. 12-13-2004
  - No. 12-14-2004
  - No. 12-15-2004
  - No. 12-16-2004

The Custodian certifies that all of the documents that were requested by the Complainant which were maintained on file by the Township on August 23, 2004, September 7, 2004, and October 14, 2004 were provided to the Complainant. She additionally certifies that she cannot provide official minutes if they have not been prepared yet. The Custodian also asserts that in the Complainant's October 20, 2004 request, she requested to view DEP documents, rather than have them copied. The Custodian certifies that she notified the Complainant of when she could come in to view the requested records as well as advised her of an alternate way to view the same records online. The Custodian contends that anything the Township would have on file regarding these requests would be a copy of another agency's original document.

### **Analysis**

**Whether the Custodian unlawfully denied access to the requested Township Committee meeting minutes, the DEP's Letters of Interpretation, and the DEP's Notices of Violation?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions...” N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received ...* The terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that:

“[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person *during regular business hours...*” (Emphasis added.) N.J.S.A. 47:1A-5.a.

Additionally, OPRA mandates that:

“[a] custodian shall permit access to a government record and provide a copy thereof *in the medium requested* if the public agency maintains the record in that medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA also provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record *shall grant access* to a government record or deny a request for access to a government record *as soon as possible, but not later than seven business days after receiving the request...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Open Public Meetings Act provides that:

“[e]ach public body shall keep reasonable comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.” N.J.S.A. 10:4-14.

### Township Committee Meeting Minutes

The Complainant asserts submitting an OPRA request on October 7, 2004 for the Township Committee meeting minutes from October 2003 through October 2004 in any form including audio tape or handwritten notes. She claims to have received a response from the Custodian dated October 14, 2004 in which the Custodian asserted that any tapes or handwritten notes of Township meetings are not public information as they are just a tool she uses to prepare the minutes and that minutes cannot be released until approved by the governing body. The Custodian certifies that she cannot provide official minutes if they have not been prepared yet.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The draft minutes in question are prepared as part of the process of producing minutes of a meeting of a public body that was held pursuant to the Open Public Meetings Act (OPMA). Specifically, OPMA provides:

Each public body shall keep reasonable comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act. N.J.S.A. 10:4-14.

The question of whether such draft minutes are exempt from disclosure requires consideration of the general question of the status of draft documents under OPRA. As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as information either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. Ibid. See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency’s deliberations. In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), cert. den. 182 N.J. 149 (2004); *see also* In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). As a



result, OPRA “shields from disclosure documents ‘deliberative in nature, containing opinions, recommendations, or advice about agency policies,’ and ‘generated before the adoption of an agency’s policy or decision.’” Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannet New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7<sup>th</sup> Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F.Supp. 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “‘reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.’” Id. at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (DOC) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

The trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. Ibid. (Emphasis added.)

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. See also Edwards v. City of Jersey City, GRC No. 2002-71 (February 27, 2004) (noting that in general, drafts are deliberative materials).

Although draft minutes always fall under OPRA’s exemption for deliberative material, the Appellate Division has suggested that the confidentiality accorded to deliberative records may be overcome if the requestor asserts and is able to demonstrate an overriding need for the record in question. See In re Readoption, *supra*, 367 N.J. Super. at 73. Resolution of such a claim, if raised by the requestor, will depend upon the particular circumstances of the case in question.

Additionally, in O’Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006), the Council held that “the Board Secretary’s handwritten notes taken during the June 22, 2004 executive session were exempt from disclosure under the ‘inter-agency, intra-agency advisory, consultative, or deliberative’ privilege pursuant to N.J.S.A. 47:1A-1.1.”

Thus, in accordance with the foregoing case law, all draft documents including handwritten notes, including the draft minutes of a meeting held by a public body, are

entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body's decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14.

Therefore, the unapproved, draft meeting minutes and the Custodian's handwritten notes of the Township Committee meetings constitutes inter-agency or intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006). As such, the Custodian has born her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested minutes which have not already been provided to the Complainant have not been approved by the governing body. These minutes should be released when they have been approved by the governing body.

This conclusion is a departure from prior GRC decisions and is based on the legal advice received from the Office of the Attorney General.

Likewise, the Custodian has not unlawfully denied access to the audio tapes of the same Township Committee meetings because these tapes also constitute inter-agency or intra-agency advisory, consultative, or deliberative material. These tapes, like the minutes, should be released when they have been approved by the governing body.

#### DEP's Letters of Interpretation and DEP's Notices of Violations

The Complainant states that she submitted a second OPRA request on October 20, 2004 for all DEP Notices of Violation and Letters of Interpretation from January 2002 to the present on all Township properties.

The Custodian certifies providing a written response on October 28, 2004 in which she indicated that the requested documents were available for viewing in the Municipal Building, Monday through Friday from 9:00am– 3:00pm. The Custodian also certifies that she provided the Complainant with an alternate means of accessing these records by giving her instructions on how to find these documents on the DEP's website.

The language of OPRA is clear that a custodian is to provide requested records in the medium in which they are requested pursuant to N.J.S.A. 47:1A-5.d. Additionally, N.J.S.A. 47:1A-5.i states that a custodian must either grant or deny access to a requested record within seven (7) business days of receiving said request. N.J.S.A. 47:1A-5.a provides that records may be inspected during an agency's regular business hours.

Since the Custodian certifies granting the Complainant access to the requested records within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i by allowing the Complainant to view the records during regular business hours pursuant to N.J.S.A. 47:1A-5.a and the Complainant's request to inspect the requested records, the Custodian has properly responded to the Complainant's request and has not unlawfully denied access to the requested records.

#### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The unapproved draft meeting minutes and the Custodian's handwritten notes of the Township Committee meetings constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, as well as O'Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006). As such, the Custodian has born her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested minutes which have not already been provided have not yet been approved by the governing body.
2. Likewise, the Custodian has not unlawfully denied access to the audio tapes of the same Township Committee meetings because these tapes also constitute inter-agency or intra-agency advisory, consultative, or deliberative material. These tapes, like the minutes, should be released when they have been approved by the governing body.
3. Since the Custodian certifies granting the Complainant access to the requested records within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. by allowing the Complainant to view the records during regular business hours pursuant to N.J.S.A. 47:1A-5.a. and the Complainant's request to inspect the requested records, the Custodian has properly responded to the Complainant's request and has not unlawfully denied access to the requested records.

Prepared By: Dara Lownie  
Dara Lownie  
Case Manager

Approved By: Catherine Starghill  
Catherine Starghill, Esq.  
Executive Director

September 7, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Richard Rivera<sup>20</sup>  
Complainant**

**GRC Complaint No. 2006-48**

**v.**

**Town of West New York<sup>21</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

A copy of the March 2003, March 2004 and June 30, 2005 Town of West New York check registry on a CD-ROM in Excel spread sheet format with the cost not to exceed \$300.00.<sup>22</sup>

**Request Made:** June 15, 2005

**Response Made:** June 28, 2005

**Custodian:** Carmela Riccio

**GRC Complaint filed:** February 21, 2006

**Background**

**June 15, 2005**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests a copy of the March 2003, March 2004 and June 30, 2005 Town of West New York check registry on a CD-ROM in Excel spread sheet format with the cost not to exceed \$300.00

**June 28, 2005**

Memo from Chief Financial Officer ("CFO") Darren Maloney to the Custodian. Mr. Maloney states that the cost to copy the records is \$300.00.

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<sup>20</sup> No legal representation listed.

<sup>21</sup> Represented by Assistant Town Attorney George Campen, Esq., located in Union City, NJ.

<sup>22</sup> Stated on the Complainant's record request received by the Custodian June 15, 2005. The Denial of Access Complaint does not indicate the date of the request.

**June 28, 2005**

Custodian's response to the OPRA request. The Custodian had the Complainant sign a document, acknowledging the receipt of the requested documents in CD-ROM Excel format and informing him of the required \$300.00 payment for the CD-ROM copy.

**June 29, 2005**

Invoice # 12067 from First Byte Corporation to the Town of West New York. First Byte Corporation indicates that the cost of converting the records (programming) is \$300.00.

**February 21, 2006**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- June 15, 2005 Complainant's OPRA request, and
- June 28, 2005 Memo from Chief Financial Officer ("CFO") Darren Maloney to the Custodian.

The Complainant asserts that he made several attempts to purchase the requested check registry for a reasonable fee, but the CFO advised that the cost was \$300.00 for a copy in Excel format on CD-ROM. He states that he previously purchased copies of CD-ROMs from the Custodian and was charged \$5.00 for the copy. He contends that the cost for the copies of the requested registry is excessive. He states that in researching the public records, he learned that the Town of West New York's vendor, who produced the CD-ROM of the check registry database for the Complainant, charges the Town \$100.00 per hour for its services.

**March 1, 2006**

Offer of Mediation sent to both parties.

**March 6, 2006**

Custodian's signed Agreement to Mediate. The Complainant did not agree to mediate this case.

**March 9, 2006**

Request for Statement of Information sent to the Custodian.

**March 13, 2006**

E-mail from the Complainant. The Complainant wishes to withdraw this complaint because he was provided the invoice of the data company that billed the town for the records requested, which indicates that the company billed the town \$300.00 for the production of his request.

**March 14, 2006**

E-mail from the GRC to the Complainant. The GRC confirms receipt of the Complainant's withdrawal of this case.

**March 24, 2006**

E-mail from the Complainant. The Complainant states that he would like his complaint reinstated. The Complainant indicates that this request for reinstatement is based on the decision in the Libertarian Party of Central New Jersey, and John Paff v. Reina A. Murphy, as Custodian for the Township of Edison, Docket No. A-2890-04T2<sup>23</sup> Superior Court of New Jersey, Appellate Division in which the appeals court found that “the fee imposed by the Township of Edison creates an unreasonable burden on the plaintiffs’ right of access and is not rationally related to the actual cost of reproducing the records.”

**April 5, 2005**

Letter from the GRC to the Complainant. The GRC informs the Complainant that this complaint is being reinstated.

**April 11, 2006**

Custodian’s Statement of Information (“SOI”) with the following attachments:

- June 15, 2005 Complainant’s OPRA request,
- June 28, 2005 memo from CFO Darren Maloney to the Custodian,
- June 28, 2005 Custodian’s response to the OPRA request,
- March 13, 2006 e-mail from the Complainant to the GRC,
- March 14, 2006 e-mail from the GRC to the Complainant,
- March 24, 2006 e-mail from the Complainant to the GRC, and
- April 5, 2006 e-mail from the GRC to the Complainant.

The Custodian certifies that the Complainant asked that the request be provided on CD-ROM in Excel format. The Custodian states that she then contacted the CFO Darren Maloney to obtain the records, as they are not held in the Municipal Clerk’s Office. The Custodian states that Mr. Maloney in turn contacted First Byte Corporation, which provides technical support for the Town of West New York. On June 28, 2005, the Custodian asserts that she was informed of the \$300.00 cost for First Byte Corporation to create the CD-ROM in response to this request, of which she verbally informed the Complainant. The Custodian states that the Complainant acknowledged receipt of the documents requested and paid the fee on June 28, 2005. The Custodian asserts that it is the position of the Town that the cost to produce the record in the medium requested was that imposed by a third party independent contractor and not a cost imposed by the Town.

Additionally, the Custodian states that pursuant to the GRC proposed rules, *N.J.A.C. 5:105-2.2*, the Complainant may only file a complaint within six (6) months of the OPRA request. Therefore, the Custodian feels that the complaint was untimely and should be dismissed.

**May 9, 2006**

Complainant’s response to the SOI. The Complainant states that after searching the contracts, agreements and check registries, it appears that the Town of West New York has a contract with First Byte Corporation and has paid for the services provided, including that which he paid \$300.00 for, and does not believe that duplicative cost

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<sup>23</sup> Libertarian Party of Central New Jersey, and John Paff v. Reina A. Murphy, as Custodian for the Township of Edison, 384 N.J. Super. 136.

should be passed on to him. The Complainant states that he should have been charge the actual cost of copying information from a computer file to a CD-ROM or other less expensive formats could have been offered.

The Complainant adds that he has ask for and reviewed any and all documents relating to First Byte Corporation for a number of years however, the June 29, 2005 invoice was not provided. The Complainant states that this causes him to question the actions of the Finance Department in providing access to public records and contends that the charge incurred for this request is an attempt to make it cost prohibitive for the public to access these records. The Complainant feels that the timing of this complaint is irrelevant because the Custodian is still charging exorbitant fees for the production of records.

#### **May 19, 2006**

Custodian's response to the Complainant's May 9, 2006 submission. The Custodian certifies that she will rely on the attached memo sent to her by CFO Darren Maloney dated May 19, 2006. Mr. Maloney states that the software maintenance agreement with First Byte Corporation does not include requests for copying a check register onto a CD-ROM in Excel format. Mr. Maloney asserts that First Byte Corporation charged the Town of West New York \$300.00, which the requestor agreed to and promptly paid.

#### **August 15, 2006**

Letter from the GRC to the Custodian. The GRC requests that the Custodian certify to the following:

- A statement regarding whether or not the Town of West New York maintains the requested check registry in Excel format,
- The reason for seeking the assistance of an outside vendor for the production of the requested CD-ROM, and
- A statement as to whether or not the Town of West New York has the capability of creating the requested CD-ROM in-house.

#### **August 16, 2006**

E-mail from the Complainant to the GRC. The Complainant states that while the Complainant's request did specify Excel format, the Complainant should have asked if there was another electronic format available on CD-ROM that the town uses.

#### **August 29, 2006**

Custodian's certification. The Custodian states that the Town of West New York asked First Byte Corporation to convert the information into the medium requested because the Town of West New York does not maintain the requested check registry in Excel format, nor do they have the ability to convert same to CD-ROM.

## Analysis

### **Whether the Complainant was over charged for the production of the requested check registries on a CD-ROM in Excel spread sheet format?**

OPRA provides that

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions...”  
N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received ...*” (Emphasis added.)  
N.J.S.A. 47:1A-1.1.

OPRA states that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. *If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology... that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.*”  
N.J.S.A. 47:1A-5.d.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant asserts that he made several attempts to purchase the requested March 2003, March 2004 and June 30, 2005 check registry for a reasonable fee, but the CFO advised that the cost was \$300.00 for a copy in Excel format on CD-ROM. He contends that the cost for the copies of the requested registry is excessive. The Custodian



certifies that the Complainant asked that the request be provided on CD-ROM in Excel format. The Custodian states that the Town of West New York asked First Byte Corporation to convert the information into the medium requested because the Town of West New York does not maintain the requested check registry in Excel format, nor do they have the ability to convert same to CD-ROM.

OPRA allows for Custodians to charge the cost that is actually incurred for the conversion of documents to the medium requested if the agency does not maintain documents in the medium requested. In the complaint at hand, the Custodian has certified that the Town does not maintain the requested records in Excel format and so they are unable to produce the check registry in Excel format on the CD-ROM requested. This being the case, the Custodian contacted First Byte Corporation, a vendor of the Town to convert the requested check registries to Excel and copy them to a CD-ROM. The Custodian was informed by that contractor that the cost for the conversion of the check registries is \$300.00.

In Burns v. Borough of Collingswood, GRC Case No. 2004-217 (April 2005) the GRC found that the Custodian should “disclose the records responsive to the request in the format requested in accordance with N.J.S.A. 47:1-5.d. subject to fees, if any, that may be directly associated [with] converting the documents to the medium requested. The Custodian shall inform the Complainant of the costs involved in converting the documents to the requested medium prior to fulfilling the request.” In the complaint at hand, the Custodian has provided the invoice from First Byte Corporation indicating \$300.00 as the actual cost for production of the records responsive to this request in the medium requested. The Complainant acknowledged receipt of the documents requested and was informed of and paid the \$300.00 fee. Thus, the actual cost of producing that record was passed on to the Complainant pursuant to N.J.S.A. 47:1A-5.d.


Additionally, the Custodian states that pursuant to the GRC proposed rules, *N.J.A.C. 5:105-2.2*, the Complainant may only file a complaint within six (6) months of the OPRA request. Therefore, the Custodian feels that the complaint was untimely and should be dismissed. The Custodian’s argument regarding the timeliness of this complaint is compelling however, the GRC proposed rules, *N.J.A.C. 5:105-2.2* have not yet been adopted.


Hence, the Custodian has passed on the actual cost for production of the requested check registries on a CD-ROM in Excel spread sheet format to the Complainant pursuant to N.J.S.A. 47:1A-5.d., and in accordance with the GRC decision in Burns v. Borough of Collingswood, GRC Case No. 2004-217 (April 2005). Therefore, the Custodian has properly charged the Complainant for the requested check registries on a CD-ROM in Excel spread sheet format. Also, while the Custodian’s argument regarding the timeliness of this complaint is compelling, the GRC proposed rules, *N.J.A.C. 5:105-2.2* have not yet been adopted.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has passed on the actual cost for production of the requested check registries on a CD-ROM in Excel spread sheet format to the Complainant pursuant to N.J.S.A. 47:1A-5.d., and in accordance with the GRC decision in Burns v. Borough of Collingswood, GRC Case No. 2004-217 (April 2005). Therefore, the Custodian has properly charged the Complainant for the requested check registries on a CD-ROM in Excel spread sheet format.
2. While the Custodian's argument regarding the timeliness of this complaint is compelling, the GRC proposed rules, *N.J.A.C. 5:105-2.2* have not yet been adopted.

Prepared By:   
Colleen C. McGann  
Case Manager

Approved By:   
Catherine Starghill, Esq.  
Executive Director  
Government Records Council

September 7, 2006

**DRAFT**  
**STATE OF NEW JERSEY**  
**GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director**  
**September 21, 2006 Council Meeting**

**Narinder Kumar Gautam<sup>24</sup>**  
**Complainant**

**GRC Complaint No. 2006-49**

**v.**

**Department of Banking and Insurance (“DOBI”)<sup>25</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** A copy of the Complainant’s (Narinder Gautam) psychiatric evaluation report.

**Request Made:** December 6, 2005

**Response Made:** December 13, 2005

**Custodian:** Gary Vogler

**GRC Complaint filed:** February 21, 2006

**Background**

**August 15, 2006**

Interim Order and Findings and Recommendations of the Government Records Council. At the August 10, 2006 public meeting, the Government Records Council (“Council”) considered the August 3, 2006 Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the Executive Director’s analysis, but adopted a different conclusion. The Council, therefore, found that:

1. Based on the Council’s rulings in Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28, (October 2004) and Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128, (November 2004), as well as N.J.S.A. 47:1A-1 (a public agency’s responsibility and obligation to safeguard a citizen’s right to privacy), the Custodian may not have unlawfully denied access to the one paragraph the Custodian wishes to redact. However, the Council should conduct an *in camera* inspection of the one paragraph to determine whether the Custodian has unlawfully denied access to this information or not.
2. In Hewitt v. Longport Police Department, GRC Case No. 2004-148 (March 2005), the Council determined that an “individual in interest” means the person who is the subject of the personnel file. Therefore, based on the fact that the OPRA request was made by the Department employee who actually

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<sup>24</sup> No legal representation on record.

<sup>25</sup> Represented by the Division of Law (DOL).

underwent the examination, and is the subject of the report, the Complainant is entitled to the entire report, including maybe the one paragraph that the Custodian has deemed non-disclosable. Based upon the Council's decision in Hewitt, the Custodian unlawfully denied access to this record. It should, however, be noted that Custodian's Counsel informed the GRC staff that they were willing to disclose the report except for the one paragraph that is not disclosable.

#### **August 15, 2006**

*In camera* letter requesting documents sent to both parties.

#### **August 28, 2006**

The Complainant responds to the Interim Order. The Complainant again objects to the redaction of the one paragraph in the report. The Complainant states that in the Custodian's initial response to his (the Complainant) request on December 13, 2005 they stated that no redactions were necessary. Therefore, he states that he considers all aspects of redaction totally inappropriate. (The Custodian's initial response to the request was to deny the entire report, therefore, at that time no redactions were deemed necessary by the Custodian because they claimed that the entire report was non-disclosable.)

#### **August 30, 2006**

The Complainant submits additional correspondence to the GRC staff wherein he states that there should be no fear of unsolicited contact by him because over the last thirty years there has not been one instance of such contact.

#### **September 11, 2006**

The Complainant submits additional correspondence to the GRC staff wherein he objects to the fact that the psychiatric report was received before the day of the Council meeting.

#### **September 6, 2006**

Certification of the Custodian with the following attachments:

- An *index* of the document requested by the Council
- The Complainant's psychiatric report with the unredacted paragraph (highlighted in pink)

The Custodian's certification states that the records provided are a true and exact copy of the complete November 10, 2004 report prepared by Dr. Carl Chiapetta. The one paragraph withheld by the Department, in entirely unredacted form, has been highlighted.

The Custodian's certified index indicates the following exemptions:

<b>Title &amp; Date</b>	<b>General Nature Description</b>	<b>Claimed Statutory Exemption(s) and/or Privilege(s)</b>	<b>Explanation Why the Claimed Exemption(s) and/or Privilege(s) Applies</b>
Report prepared by	Information about current	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-1.1;	Employees who raise concern over

Dr. Carl J. Chiappetta dated November 10, 2004	employees of the Department of Banking and Insurance expressing workplace concerns.	<u>N.J.S.A. 47:1A-3.b.</u> <u>N.J.S.A. 47:1A-10</u> Executive Order 49 (1996); <u>Wilcox v. Township of West Caldwell</u> (GRC Case No. 2004-28) ; and <u>Perino v. Borough of Haddon Heights</u> , (GRC Case No. 2004-128). <u>See also</u> letter brief dated April 7, 2006.	workplace violence do so with the reasonable expectation that their name, as well as the reasons for such concern, will never be disclosed. Disclosure of such information is also not considered a government record under OPRA. See also letter brief dated April 7, 2006.
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### **Analysis**

An *in camera* inspection was conducted on the following document: the one paragraph that was withheld in the Complainant's psychiatric report. Based on this *in camera* inspection the Council finds:

The one paragraph that was withheld in the Complainant's psychiatric report dated 11/10/2004 consists of six (6) sentences within one (1) paragraph.


**“The one paragraph in the Complainant's psychiatric report”:** The entire paragraph, except for the first sentence, is exempt from disclosure pursuant to N.J.S.A. 47:1A-1, (a public agency's responsibility and obligation to safeguard a citizen's right to privacy), as well as Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28, (October 2004) and Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128, (November 2004).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that the entire paragraph in the Complainant's psychiatric report, except for the first sentence, is exempt from disclosure pursuant to N.J.S.A. 47:1A-1, (a public agency's responsibility and obligation to safeguard a citizen's right to privacy), as well as Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28, (October 2004) and Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128, (November 2004).



Prepared By: Christopher Malloy  
Case Manager

Approved By:   
Catherine Starghill, Esq.  
Executive Director

September 7, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Vesselin Dittrich<sup>26</sup>  
Complainant**

**GRC Complaint No. 2006-50**

**v.**

**Department of Community Affairs, Bureau of Homeowner Protection  
Custodian of Records**

**Records Relevant to Complaint:**

Records of all communications, included but not limited to letters, memos, reports, faxes, e-mails, records of phone conversations, and of all meetings conferences, and all other contacts and interactions between employees, staff, supervisors, attorneys and any and all other agents of the Director William Connelly, Department of Community Affairs (“DCA”), Division of Codes and Standards, and any and all other agents, actual or apparent, of 931 Park Avenue Condominium Association (“Condominium Association”), located at 931 Park Avenue, Hoboken, NJ 07030, starting August 17, 2005 to present and excluding the records already provided to the Complainant in response to his August 16, 2005 request.

**Request Made:** January 29, 2006

**Response Made:** February 9, 2006

**Custodian:** Peter Desch, Chief, Bureau of Homeowner Protection

**GRC Complaint Filed:** February 23, 2006

**Background**

**January 29, 2006**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant is requesting copies of all communications between the DCA, Division of Codes and Standards and the Condominium Association from August 17, 2006 to the time of the request.

**February 9, 2006**

Custodian’s response to the OPRA request. The Custodian advises the Complainant in writing, eight (8) days after the request, that his payment of \$8.00 for the requested records has been received. The Custodian states that the requested records are being released as an attachment to this correspondence.<sup>27</sup>

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<sup>26</sup> No legal representation listed.

<sup>27</sup> Copies of which were included by the Complainant in the Denial of Access Complaint.

**February 23, 2006**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:<sup>28</sup>

- January 29, 2006 Complainant’s OPRA request, and
- February 9, 2006 Custodian’s response to the OPRA request.

The Complainant states that he submitted two OPRA requests on January 29, 2006. The Complainant indicates that on February 9, 2006 he received a response to his requests releasing eleven (11) pages of documents which the Custodian stated were responsive to both of the requests filed on January 29, 2006. The Complainant states that the documents provided to him were responsive to one request but he has not received documents responsive to the request that is subject of this complaint.

**March 2, 2006**

Offer of Mediation sent to both parties.

**March 2, 2006**

Complainant’s signed Agreement to Mediate.

**March 6, 2006**

Custodian’s signed Agreement to Mediate.

**March 6, 2006**

Complaint forwarded to mediation.

**April 10, 2006**

Complaint referred back from mediation.

**April 12, 2006**

Request for Statement of Information sent to the Custodian.

**April 12, 2006**

Custodian’s Statement of Information (“SOI”) with the following attachment:

- April 12, 2006 Custodian’s certification.

The Custodian states that the Complainant was provided with a complete copy of the file maintained by the DCA, Bureau of Homeowner Protection with the exception of one (1) e-mail which the Custodian asserts is exempt as advisory, consultative and deliberative material. The Custodian certifies that this document is an e-mail sent to staff in the Association Regulation Unit, in which the Custodian makes recommendations regarding the Complainant’s pending case with them. This e-mail is a follow-up to a telephone conversation between the President of the Condominium Association and the Custodian. The Custodian adds that while the Complainant seeks a record of the phone conversation as well, the Complainant was informed that there is no phone log registering that call.

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<sup>28</sup> Other documents that are not subject of this Complaint were provided but are not included in this Findings and Recommendations.



**April 26, 2006**

Custodian's supplement to the SOI. The Custodian provides the following information:

<b>List of all Documents not provided in Response to the Complainant's January 29, 2006 OPRA Request (include number of pages for each document)</b>	<b>Documents Not Provided to Complainant, in Whole</b>	<b>Legal Explanation and Citation for Non-disclosure or redactions</b>
December 6, 2006 e-mail from the Custodian to Supervising Research Analyst Edward Hannaman	In this e-mail, the Custodian is providing another member of staff with a recount of a telephone conversation with the President of the 931 Park Avenue Condominium Association and a recommendation on how the agency should proceed on the Complainant's complaint against the Condominium Association.	The Custodian claims that the subject e-mail is advisory, consultative and deliberative in nature. The Custodian asserts that the requested e-mail is <i>predecisional</i> , as it was generated before a decision was made by the agency in the Complainant's complaint against the Condominium Association and <i>deliberative</i> , in that it offers recommendations for further action and contains what were unsubstantiated claims made by President of the Condominium Association. Additionally, the Custodian states that the e-mail contains a preliminary view that suggests an agency decision that had not yet been made for lack of facts or definitive proof. The Custodian also states that the e-mail attributes statements to a third party and is hearsay.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested documents relating to the 931 Park Avenue Condominium Association?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA also provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

Additionally, OPRA states that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the *specific basis therefore on the request form and promptly return it to the requestor*. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g

The Complainant indicates that he received eleven (11) pages of documents responsive to one of his requests but he has not received documents responsive to the

request that is subject of this complaint. The Custodian states that the Complainant was provided with a complete copy of the file maintained by the DCA, Bureau of Homeowner Protection with the exception of one (1) e-mail, which the Custodian asserts is not a government record pursuant to N.J.S.A. 47:1A-1.1 because it is advisory, consultative and deliberative material.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. However, OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1.

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1.

It is evident that this phrase is intended to exclude, from the definition of a government record, the types of documents that are the subject of the “deliberative process privilege.” That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (2) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
  - c. Deliberative materials do not include purely factual materials.
  - d. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - e. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.

- f. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position.*
  - g. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*
- (3) Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.
- a. That burden can be met by a showing of the importance of the information to the requesting party, its availability from other sources and the effect of disclosure on frank and independent discussion of contemplated government policies.

The Custodian claims that the entirety of the subject e-mail is advisory, consultative and deliberative in nature. The Custodian asserts that the requested e-mail is *predecisional*, as it was generated before a decision was made by the agency in the Complainant's complaint against the Condominium Association and *deliberative*, in that it offers recommendations for further action and contains what were unsubstantiated claims made by President of the Condominium Association. Additionally, the Custodian states that the e-mail contains a preliminary view that suggests an agency decision that had not yet been made for lack of facts or definitive proof. The Custodian also states that the e-mail attributes statements to a third party and is hearsay. Based on the legal standard set forth by the Courts and the certified statements of the Custodian, the Custodian properly denied access to the requested e-mail as it is advisory, consultative and deliberative in content and therefore not a government record pursuant to N.J.S.A. 47:1A-1.1.

However, OPRA also mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. Also indicated in N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. OPRA allows the Custodian to deny access to records under those circumstances in which the records requested are exempt from access, under OPRA or any other law. If a Custodian asserts an exemption under the law the Custodian is required to notify the Complainant in writing of the specific legal basis for the denial. In Gober v. City of Burlington, GRC Case No. 2003-139 (April 2004), the Council found that "[b]ecause the OPRA presumes that a government record is subject to public access unless an exemption exists, it is appropriate to order that access be granted unless an appropriate exemption is clearly identified by the Custodian." The onus rests on the Custodian to prove that the denial of access is authorized by law pursuant to N.J.S.A. 47:1A-6.

In this case, the Custodian did not provide any indication to the Complainant that a portion of his request was being denied, nor did he provide a reason for denying access to the requested record. While the Custodian's assertion that the records not provided are advisory, consultative and deliberative and therefore not government records, the Custodian failed to provide the Complainant with a written lawful basis for denial of access to this document. Therefore, the Custodian's failure to provide to the Complainant a lawful basis for a denial of access to the e-mail within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. Additionally, as the Custodian failed to provide a written response indicating a denial to the e-mail at issue, the Custodian violated N.J.S.A. 47:1A-5.g.

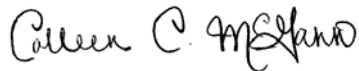
In summary, based on the legal standard set forth by the Courts and the certified statements of the Custodian, the Custodian properly denied access to the requested e-mail as it is advisory, consultative and deliberative in content and therefore not a government record pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian's failure to provide to the Complainant a lawful basis for a denial of access to the e-mail within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. Additionally, since the Custodian failed to provide a written response indicating a denial to the e-mail at issue, the Custodian violated N.J.S.A. 47:1A-5.g.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Based on the legal standard set forth by the Courts and the certified statements of the Custodian, the Custodian properly denied access to the requested e-mail as it is advisory, consultative and deliberative in content and therefore, not a government record pursuant to N.J.S.A. 47:1A-1.1.
2. The Custodian's failure to provide to the Complainant a lawful basis for a denial of access to the e-mail within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i.
3. The Custodian's failure to provide a written response indicating a lawful denial to the e-mail at issue is a violation of N.J.S.A. 47:1A-5.g.

Prepared By:



Colleen C. McGann  
Case Manager

Approved By:



Catherine Starghill, Esq.  
Executive Director

September 7, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Norman Berger<sup>29</sup>  
Complainant**

**GRC Complaint No. 2006 - 56**

**v.**

**Kean University<sup>30</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copies of any letter of Intent, Memorandum of Understanding, or agreement between Kean University and the Liberty Hall Family Foundation or the related entities pertaining to the construction of a road through the Liberty Hall Museum property, located at 103 Morris Ave., Union, NJ 07083.
2. Copies of traffic studies or traffic counts of university shuttle buses between the Main Campus and the East Campus.
3. The proposed cost of the road construction project through the Liberty Hall Museum property and whether contracts have been made or executed.
4. Whether there are additional construction projects on the horizon, going out ten (10) years, which will impact residents of Mary Alice Court, including but not limited to the construction of a science laboratory building in Liberty Hall Center.

**Request Made:** February 22, 2006<sup>31</sup>

**Response Made:** February 22, 2006

**Custodian:** Tina Lisa

**GRC Complaint filed:** March 6, 2006

**Background**

**February 7, 2006**

Complainant's letter of request asking for the records enumerated above.

**February 22, 2006**

Letter from the Custodian to the Complainant. The Custodian advises the Complainant that all OPRA requests must be received by the Custodian on the enclosed OPRA form.

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<sup>29</sup> No legal representation listed.

<sup>30</sup> Represented by the Division of Law (DOL).

<sup>31</sup> In his Denial of Access Complaint, the Complainant listed February 7, 2006 as the date of his OPRA request. However, pursuant to the Council's decision in Glenn v. NJ Department of Community Affairs, Division of Housing GRC Case No. 2005-47 (April, 2006) an OPRA request must be made on an official form. Based on that, the Complainant's OPRA request was made on February 22, 2006.

**February 22, 2006**

Complainant's Open Public Records Act ("OPRA") request asking for the records enumerated above.

**February 22, 2006**

Custodian's response to the Complainant's OPRA request. The Custodian informs the Complainant that in reference to the first category of requested records (copies of any letter of Intent, Memorandum of Understanding, or agreement between Kean University and the Liberty Hall Family Foundation or the related entities pertaining to the construction of a road through the Liberty Hall Museum property, located at 103 Morris Ave., Union, NJ 07083), the document is not a government record available under OPRA because it is deliberative material. The Custodian informs the Complainant that in reference to items two (2), three (3), and four (4), there are no government records maintained by the Custodian that meet his request.

**March 6, 2006**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- February 7, 2006 – Letter of request
- February 22, 2006 – OPRA request/denial of OPRA request
- February 22, 2006 – Denial of OPRA request

The Complainant states that the proposed roadway will connect the Main Campus located along Morris Avenue. He states that the roadway will come within feet of the property line of homes located on Mary Alice Court.

The Complainant alleges that there is no pending litigation in reference to this matter. He states that it is our contention (Liberty Hall Village Homeowners Association) that the requested documents are necessary in order to prove the effectiveness and efficiency of the overall project.

**March 10, 2006**

Offer of Mediation sent to both parties.

**March 13, 2006**

Custodian's Agreement to Mediate. The Complainant did not agree to mediate this case.

**March 28, 2006**

Request for Statement of Information sent to the Custodian.

**April 20, 2006**

E-mail from the Custodian to the GRC staff. The Custodian states that additional documents have been located within the scope of this request, and have now been provided to the Complainant. The Custodian goes on to state; however, that a few documents that were located are confidential pursuant to OPRA and the Complainant has not agreed to withdraw his complaint.

**April 27, 2006**

Custodian's Statement of Information ("SOI") with the following attachments:

- February 7, 2006 – Letter of request
- February 22, 2006 – OPRA request
- February 22, 2006 – Denial of OPRA request
- February 22, 2006 – Letter from the Custodian to the Complainant informing him that he must use the form

Custodian's Counsel states that the Complainant made his request to Kean University by letter to the University Counsel on February 7, 2006, which was received by Kean University's Custodian on February 14, 2006. Counsel goes on to state that the Custodian faxed the necessary OPRA request form to the Complainant on February 22, 2006 and received the completed form back on the same day. Counsel states that the Custodian responded to the request that same day.

Counsel states that the request sought first, a copy of any Letter of Intent, Memorandum of Understanding, or agreement between Kean University and the Liberty Hall Family Foundation pertaining to construction of a road through the Liberty Hall Museum property. Counsel states that the "Liberty Hall Memorandum of Understanding" ("MOU") on the Proposed East Campus Shuttle Bus Link, executed by the President of Kean University as a second party, on June 22, 2005, was within the scope of this request and a copy was provided to the Complainant on March 31, 2006. Custodian's Counsel states that the Custodian initially denied the request opining that the document was deliberative. She states that the Custodian's response was made in good faith on advice of University Counsel.

In response to the request for copies of traffic studies or traffic counts of university shuttle buses between the Main Campus and the East Campus the Custodian's February 22, 2006 response stated accurately that no such record existed because at that time the University had not received any such traffic study from its consultants. Counsel states that after the GRC Complaint was filed, the traffic study dated March 6, 2006 was received by Special Counsel to the University and a copy was provided for the Complainant's inspection on April 7, 2006.

In response to the third request for the proposed cost of the road construction project through the Liberty Hall Museum property and whether contracts have been made or executed, the Custodian's February 22, 2006 response stated that no such record exist because the request was for specific information, rather than a request for any identifiable government record. However, Counsel states that upon consideration, the University determined to read this request very broadly as expressing intent by the Homeowners Association to request copies of any contracts awarded by the University related to the East Campus Shuttle Bus Link road/bridge construction project. Upon that broad reading, Counsel states that Kean University provided the Complainant an opportunity to inspect and request copies of three documents which relate to the contract awarded for Architectural/Engineering Design of the East Campus Link.



With respect to the initial phrasing of the request for the “estimated cost of the East Campus Shuttle Bus Link construction project,” the University has identified one intra-agency document which contains an estimated cost. Custodian’s Counsel goes on to state that this document lists very preliminary estimates of costs of various proposed capital projects, and was compiled by the University as internal preliminary and deliberative financial information used in consultation with the New Jersey Educational Facilities Authority in preparation for the 2005 issuance of publicly traded securities on behalf of Kean University. Counsel goes on to state that this document, which lists estimated allocations of the bond proceeds, is very preliminary information compiled for interagency consultation, and not for inclusion in the public record with respect to the issuance of these public securities. Counsel states that the list is preliminary in that the actual allocation of bond proceeds among the various projects approved for bond funding is subject to change at any time until the bond proceeds are fully expended. Counsel goes on to state that public disclosure of the cost estimates would inappropriately reveal the total amount of bond proceeds which the University currently estimates to be necessary for this project, and the allocations available for the other capital projects described in the Official Statement. Counsel states that public disclosure of the list of preliminary estimate of total project construction costs for the East Campus Shuttle Bus Link now, prior to the advertisement for and award of construction contracts, could afford a competitive advantage to bidders and could increase the cost of these capital projects to the citizens of the State of New Jersey, contrary to the public interest.

Further, Custodian’s Counsel respectfully submits that the release of the list redacting the dollar estimates of project costs, while eliminating the competitive advantage to bidders, would still not be in the public interest. Counsel states that the extremely limited “factual” information included on the document describing each project on this interagency consultative document was very preliminary and, in some cases, proved to be inaccurate upon investigation and verification during the due diligence proceeding of the bond issuance. Counsel states that preliminary and unverified “factual” portions of the document, even in redacted form would only create confusion rather than serve the public interest as protected by OPRA. For those reasons, the Custodian respectfully submits that it has met its burden of proving that the list of cost estimates is not a “government record” as defined by OPRA and asks that the GRC uphold the University’s denial of this request for access to it.

In response to the fourth request of “whether there are additional construction projects on the horizon, going out ten (10) years which will impact the residents of Mary Alice Court...the Custodian’s February 22, 2006 response states that no such government record exists because the request asks for information, and is not a request for government records. Custodian’s Counsel goes on to state that reading this request very broadly, the University has now provided the requestor with an opportunity to inspect its government records which describe the University’s capital construction plans for the future (regardless of their subjective potential impact upon the Homeowners Association’s members.) Custodian’s Counsel states that on April 3, 2006, the University afforded the requestor the opportunity to inspect two responsive documents regarding the 2003 and 2005 New Jersey Educational Facilities Authority (NJEFA) bond issues which describe those capital construction projects which the University anticipates will be financed through NJEFA.

Finally, Custodian's Counsel respectfully submits that the release of the list redacting the dollar estimates of project costs, while eliminating the competitive advantage to bidders, would still not be in the public interest. Counsel states that the extremely limited "factual" information included on the document describing each project on this interagency consultative document was very preliminary and, in some cases, proved to be inaccurate upon investigation and verification during the due diligence proceeding of the bond issuance. Counsel states that preliminary and unverified "factual" portions of the document, even in redacted form would only create confusion rather than serve the public interest as protected by OPRA. For those reasons, the Custodian respectfully submits that it has met its burden of proving that the list of cost estimates is not a "government record" as defined by OPRA and asks that the GRC uphold the University's denial of this request for access to it.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to any of the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...The terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1."

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

The Complainant alleges that there is no pending litigation in reference to this matter. He states that it is the contention of the Liberty Hall Village Homeowners Association that the requested documents are necessary in order to prove the effectiveness and efficiency of the overall project.

With respect to the initial phrasing of the request for the "estimated cost of the East Campus Shuttle Bus Link construction project," the Custodian states that the

University has identified one intra-agency document which contains an estimated cost. Custodian's Counsel goes on to state that this document lists very preliminary estimates of costs of various proposed capital projects, and was compiled by the University as internal preliminary and deliberative financial information used in consultation with NJEFA in preparation for the 2005 issuance of publicly traded securities on behalf of Kean University. Counsel goes on to state that this document, which lists estimated allocations of the bond proceeds, is very preliminary information compiled for inter-agency consultation, and not for inclusion in the public record with respect to the issuance of these public securities. Counsel states that the list is preliminary in that the actual allocation of bond proceeds among the various projects approved for bond funding is subject to change at any time until the bond proceeds are fully expended. Counsel goes on to state that public disclosure of the cost estimates would inappropriately reveal the total amount of bond proceeds which the University currently estimates to be necessary for this project, and the allocations available for the other capital projects described in the Official Statement. Counsel states that public disclosure of the list of preliminary estimate of total project construction costs for the East Campus Shuttle Bus Link now, prior to the advertisement for and award of construction contracts, could afford a competitive advantage to bidders and could increase the cost of these capital projects to the citizens of the State of New Jersey, contrary to the public interest.

Custodian's Counsel respectfully submits that the release of the list redacting the dollar estimates of project costs, while eliminating the competitive advantage to bidders, would still not be in the public interest. Counsel states that the extremely limited "factual" information included in the document describing each project on this inter-agency consultative document was very preliminary and, in some cases, proved to be inaccurate upon investigation and verification during the due diligence proceeding of the bond issuance. Counsel states that preliminary and unverified "factual" portions of the document, even in redacted form would only create confusion rather than serve the public interest as protected by OPRA. For those reasons, the Custodian respectfully submits that it has met its burden of proving that the list of cost estimates is not a "government record" as defined by OPRA and asks that the GRC uphold the University's denial of this request for access to it.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1.

It is evident that this phrase is intended to exclude, from the definition of a government record, the types of documents that are the subject of the "deliberative process privilege." That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act ("FOIA"). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
  - c. Deliberative materials do not include purely factual materials.
  - d. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - e. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
  - f. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
  - g. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.
- (2) Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.
  - a. That burden can be met by a showing of the importance of the information to the requesting party, its availability from other sources and the effect of disclosure on frank and independent discussion of contemplated government policies.

In Boggia v. Borough of Oakland, GRC Case No. 2005-36 (April, 2006), the Council held that although the Custodian provided facts in support of the legal conclusions asserted, they (the Council) must determine whether the legal conclusions asserted by the Custodian (that the information which, if disclosed, would give an

advantage to competitors or bidders) were properly applied to the redacted Morris Land Conservancy reports by conducting an *in camera* inspection of those reports.

Also, in Burns v. Borough of Collingswood, GRC Case No. 2004-169 (September 2005) the Council held that while the Custodian's arguments and legal conclusions are persuasive, it can not be determined whether the Custodian has met the burden of proving that the requested document(s) are exempt from disclosure without actually reviewing the document(s) to confirm the Custodian's legal conclusions. Therefore, the Council held that they would conduct an *in camera* inspection of all the marketing studies to determine whether the document is exempt from disclosure, in whole or in part, because it is "information which, if disclosed, would give an advantage to competitors or bidders" pursuant to N.J.S.A. 47:1A-1.1.

While the Custodian has provided facts in support of the legal conclusions asserted in support of withholding the two (2) documents, the Council must determine whether the legal conclusions asserted by the Custodian (that the information which, if disclosed, would give an advantage to competitors or bidders, as well as whether the documents include inter-agency or intra-agency advisory, consultative, or deliberative material) are properly applied to the two (2) documents withheld from the Complainant. Therefore, based on Council decisions in Boggia and Burns, the Council must conduct an *in camera* inspection of the two (2) documents the Custodian deems non-disclosable.

**Whether the Custodian responded to the February 7, 2006 OPRA request within the statutorily required seven (7) business days?**

OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that:

"...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g

The Custodian certifies that the Complainant made his request to Kean University by letter to the University Counsel on February 7, 2006, which was received by Kean University's Custodian on February 14, 2006. Counsel goes on to state that the Custodian faxed the necessary OPRA request form to the Complainant on February 22, 2006 and received the completed form back on the same day. Counsel states that the Custodian responded to the request that same day.

OPRA requires a Custodian to grant or deny access to a government record in writing, as soon as possible, but not later than seven (7) business days after receiving the request.

In Glenn v. NJ Department of Community Affairs, Division of Housing GRC Case No. 2005-47 (April, 2006) the Council determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form.

Pursuant to Glenn as well as the fact that the Custodian certified that she didn't receive an official OPRA request until February 22, 2006 (the first correspondence came via letter on February 14, 2006 to which the Custodian responded by faxing the Complainant the official OPRA request form) and consequently responded that same day, she is not in violation of N.J.S.A. 47:1A-5.i. or N.J.S.A. 5.g.

**Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law under the totality of the circumstances. Specifically OPRA states:

“...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

In his Denial of Access Complaint, the Complainant listed February 7, 2006 as the date of his OPRA request. However, pursuant to the Council's decision in Glenn v. NJ Department of Community Affairs, Division of Housing GRC Case No. 2005-47 (April, 2006), an OPRA request must be made on an official form. Based on the foregoing case law, the Complainant's OPRA request wasn't *officially* made until February 22, 2006.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v.

Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Pursuant to the fact that the Custodian seemingly did research to find any and all documents that might have been responsive to the OPRA request (and gave a thorough albeit inconclusive response to the two (2) documents that are being denied), as well as the fact that the Custodian responded to the Complainant within the statutorily required seven (7) business days required by OPRA, there is no evidence that the Custodian's actions were consistent with the legal standards established for knowing and willful conduct by the New Jersey courts. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

### **Conclusions and Recommendations**

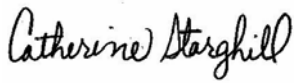
The Executive Director respectfully recommends that the Council find that:

1. While the Custodian has provided facts in support of the legal conclusions asserted in support of withholding the two (2) documents, the Council must determine whether the legal conclusions asserted by the Custodian (that the information which, if disclosed, would give an advantage to competitors or bidders as well as whether the documents include inter-agency or intra-agency advisory, consultative, or deliberative material) are properly applied to the two (2) documents withheld from the Complainant. Therefore, based on Council decisions in Boggia v. Borough of Oakland, GRC Case No. 2005-36 (April, 2006) and Burns v. Borough of Collingswood, GRC Case No. 2004-169 (September 2005), the Council must conduct an *in camera* inspection of the two (2) documents the Custodian deems non-disclosable.
2. Pursuant to Glenn v. NJ Department of Community Affairs, Division of Housing GRC Case No. 2005-47 (April, 2006) as well as the fact that the Custodian certified that she didn't receive a proper OPRA request until February 22, 2006 (the first correspondence came via letter on February 14, 2006 to which the Custodian responded by faxing the Complainant the proper OPRA request form) and consequently responded that same day, she is not in violation of N.J.S.A. 47:1A-5.i. or N.J.S.A. 5.g.
3. Pursuant to the fact that the Custodian seemingly did research to find any and all documents that might have been responsive to the OPRA request (and gave a thorough albeit inconclusive response to the two (2) documents that are being denied), as well as the fact that the Custodian responded to the Complainant within the statutorily required seven (7) business days required by OPRA, there is no evidence that the Custodian's actions were consistent with the legal standards established for knowing and willful conduct by the New Jersey courts. Therefore, the Custodian's

actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

A handwritten signature in black ink, appearing to read "Ch. Malloy".

Prepared By: Christopher Malloy  
Case Manager

Approved By:   
Catherine Starghill, Esq.  
Executive Director

September 7, 2006



**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Richard Kasper<sup>32</sup>  
Complainant**

**GRC Complaint No. 2006-57**

**v.**

**Washington Township Board of Education<sup>33</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of the most current construction report from Bovis Lend Lease, Inc. regarding the high school and the middle school.
2. Copy of the RFP or contract used to secure telephone equipment in the high school and the middle school.

**Request Made:** January 2, 2006

**Response Made:** None

**Custodian:** Paul Todd

**GRC Complaint Filed:** March 9, 2006

**Background**

**January 2, 2006**

Complainant's Open Public Records Act ("OPRA") request. The Complainant seeks a copy of the most current construction report from Bovis Lend Lease, Inc. regarding the high school and the middle school, as well as a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school.

**March 9, 2006**

Denial of Access Complaint filed with the Government Records Council ("GRC"). The Complainant states that on January 9, 2006<sup>34</sup>, he requested the following: either the request for proposal or state contract number used to purchase new telephone equipment within the district, and a final construction report from Bovis Lend Lease, Inc. involving the Robbinsville High School.

The Complainant claims that on January 13, 2006, the Custodian contacted him by phone and indicated that his request for contracts would be provided following some research, and that his request for a construction report would not be provided as the

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<sup>32</sup> No legal representation on record.

<sup>33</sup> Represented by Matthew Giacobbe, Esq. and Steven Kleinman, Esq. from the law offices of Scarinci & Hollenbeck, LLC in Lyndhurst, NJ.

<sup>34</sup> Actual date on the Complainant's OPRA request is January 2, 2006.

Board Attorney advised against it, citing potential litigation as the reason for not disclosing the documents. The Complainant asserts that he has not received any written response from the Custodian or the Board Attorney.

Further, the Complainant contends that potential litigation is not a valid reason to withhold the requested records as he claims the original bids were opened publicly, and that all change orders were approved in public session. He claims that the only explanation is that the Board of Education has exceeded its publicly approved budget and is trying to hide it from members of the public.

**March 15, 2006**

Offer of Mediation sent to both parties. Neither party agreed to mediate this case.

**March 24, 2006**

Letter from GRC staff to Complainant. Staff requests that the Complainant provide a copy of the OPRA request subject of this complaint.

**March 24, 2006**

Request for Statement of Information sent to the Custodian.

**March 30, 2006**

Letter from Complainant to GRC Staff. The Complainant asserts that he is unable to locate his original OPRA request involving this complaint. He contends that his original request and his complaint filed with the GRC involve the same issues.

**April 4, 2006**

Custodian's Statement of Information ("SOI") with the following attachments:

- Letter of Representation from Custodian's Counsel dated April 4, 2006
- Custodian's certification dated April 4, 2006
- Complainant's OPRA request dated January 2, 2006

The Custodian certifies receiving the Complainant's OPRA request on or about January 2, 2006. He certifies that on several occasions within the seven (7) business days following the date of the Complainant's request, he attempted to contact the Complainant by phone and did not reach him until on or about January 11, 2006. The Custodian certifies that on said date, he verbally provided the Complainant with the information responsive to his request for the state contract numbers used for the telephone equipment. He also certifies that this information was not made, maintained, received, or kept on file by the Board, but that "it had to be researched and compiled...and accordingly should not be considered a 'public record' under OPRA."<sup>35</sup> The Custodian also asserts that he has no objection to providing this information to the Complainant, as he has already done so verbally, and he is willing to provide the Complainant with a written compilation of the requested information.

Additionally, the Custodian certifies that the Complainant requested a thirty-nine (39) page document prepared by Bovis Lend Lease, Inc., a contractor working on constructing the new Robbinsville High School, for the Boards' internal use. The Custodian certifies that during his January 2006 phone conversation with the Complainant, he indicated that he would not be providing the Complainant with the

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<sup>35</sup> As stated in the Custodian's certification dated April 4, 2006.

requested Bovis document as the Board was, and still remains, in negotiations to approve final close out change orders on the high school project. He asserts that the requested document contains sensitive financial information and if disclosed, would provide an advantage to contractors in negotiations with the Board and should be exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian does, however, state that he is aware that upon completion of the negotiations, the document would then become a “government record” subject to disclosure under OPRA.

Further, the Custodian states that the Complainant’s request was his first OPRA request as Custodian. He also asserts that it is now his policy to respond to such requests in writing.

#### **August 5, 2006**

Letter from Custodian’s Counsel to Complainant. The Custodian’s Counsel asserts that the exemption from disclosure previously asserted by the Custodian no longer applies since the matters have been settled. The Custodian’s Counsel further states that the requested records (the Bovis Construction reports) are enclosed and therefore the issues of this denial of access complaint are moot and the complaint should be dismissed.

#### **August 23, 2006**

Letter from Complainant to Custodian’s Counsel. The Complainant takes exception with the completeness of the reports enclosed with the Custodian Counsel’s August 5, 2006 letter. Additionally, the Complainant disagrees that the issues are moot requiring the complaint to be dismissed.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also states that a government record shall not include the following information which is deemed to be confidential:

“...information which, if disclosed, would give *an advantage to competitors or bidders...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA mandates that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

#### Complainant’s Request for a Copy of the RFP or Contract Used to Secure Telephone Equipment in the High School and the Middle School

The Complainant claims to have submitted his OPRA request for a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school on January 9, 2006. The Complainant states that the Custodian contacted him by phone on January 13, 2006 and indicated that he would have to research the Complainant’s request in order to provide the requested information.

The Custodian certifies receiving the Complainant’s OPRA request on or about January 2, 2006. He also certifies that he attempted to contact the Complainant by phone several times during the seven (7) business day time period following the date of the Complainant’s request. The Custodian certifies that he eventually reached the Complainant by phone on or about January 11, 2006 and verbally provided the Complainant with the information responsive to his request. Additionally, the Custodian certifies that the requested information should not be considered a government record as it is not made, maintained, received, or kept on file as a separate document, as the requested information had to be researched and compiled. Further, the Custodian asserts that he would have no objection to providing the Complainant with a written compilation of the requested information as he has already provided said information verbally.

OPRA provides that immediate access shall be granted to budgets, bills, vouchers, and *contracts* pursuant to N.J.S.A. 47:1A-5.e. Additionally, OPRA provides that if the custodian is unable to comply

with a request for access, the custodian shall indicate the specific basis for such denial on the request form and promptly return it to the requestor pursuant to N.J.S.A. 47:1A-5.g.

In this complaint, the Custodian certifies receiving the Complainant's request on January 2, 2006 and verbally providing the Complainant with the requested information on January 11, 2006, the seventh (7<sup>th</sup>) business day following the date of the request. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian's failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g. Also, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that "[while] both the Custodian and Complainant confirm verbal contact regarding the OPRA request later in the month in which the request was made... the Custodian has violated N.J.S.A. 47:1A-5.g. in not providing the Complainant a written response to the request..."

Additionally, it is uncertain how the Custodian could have provided the Complainant "a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone" (as was the request of the Complainant). A record (the contract requested) should have been provided to the Complainant *immediately* pursuant to N.J.S.A. 47:1A-5.e., unless such record was not immediately available because it was in storage or archived. The Custodian never asserted that the requested contract was in storage or archived. Therefore, the Custodian unlawfully denied immediate access to the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone pursuant to N.J.S.A. 47:1A-5.e.

Further, the Custodian's assertion that the Complainant's request for the contract requires research which is prohibited under OPRA is misplaced. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1." (Emphasis added.) Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534 (March 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only "identifiable" government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549. As such, OPRA does not obligate a Custodian to create a document in response to a records request.

Mag Entertainment, LLC does not apply to this complaint since the request for "a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone" clearly names an "identifiable" government record as defined in Mag Entertainment, LLC. Thus, no research on behalf

of the Custodian is required to determine the record being requested. Again, in this complaint, the requested record (a copy of a contract) is clearly identifiable.

Complainant's Request for a Copy of the Most Current Construction Report from Bovis Lend Lease, Inc. Regarding the High School and the Middle School

The Complainant asserts submitting his OPRA request on January 9, 2006. He claims that on January 13, 2006, the Custodian contacted him by phone and advised that the requested record would not be provided as the Board Attorney advised against it, citing potential litigation as the basis for the denial of access. The Complainant contends that potential litigation should not cause his request to be denied as all the original bids were approved in public and all the change orders were also approved publicly.

The Custodian certifies receiving the Complainant's OPRA request on or about January 2, 2006. He certifies that several times during the seven (7) business day time frame following the date of the Complainant's request, he attempted to contact the Complainant by phone but states that he did not reach the Complainant until on or about January 11, 2006. The Custodian also certifies that during said telephone conversation, he advised the Complainant that the requested thirty-nine (39) page document, prepared by Bovis Lend Lease, Inc. for the Board's internal use, would not be provided at that time as the Board was, and remains, in negotiations to approve final close out change orders on the new high school project.

Additionally, the Custodian asserts that the requested document contains sensitive financial information, which if disclosed, would provide an advantage to contractors in negotiations with the Board. He contends that the requested document is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian also states that he is aware that the document would become a government record upon successful completion of said negotiations. He further certifies that he would have no objections to providing the requested document once the negotiations have been completed. The Custodian also states that as the Complainant's request was the first OPRA request he received as Custodian, it has now become his policy to respond to all requests in writing.

In a prior GRC case, the Council rendered a decision regarding documents that a custodian claimed to be exempt under OPRA's exemption for information, which if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. In Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the Council held that "[w]hile the custodian has provided facts in support of the legal conclusions asserted, the Council must determine whether the legal conclusions asserted by the Custodian (that the information which, if disclosed, would give an advantage to competitors or bidders) are properly applied to the redactions. Therefore, the Council must conduct an *in camera* inspection of the redacted Morris Land Conservancy reports..."

The same conclusion should be applied in this complaint. While the Custodian has provided facts that support the legal basis for the denial of access (that the information, which, if disclosed, would give an advantage to competitors or bidders), the Council should conduct an *in camera* review of the thirty-nine (39) page document prepared by Bovis Lend Lease, Inc. to determine if said document, or portions therein are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Further, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that "[while] both the Custodian and Complainant confirm verbal contact regarding the OPRA request later in the month in which the

request was made... the Custodian has violated N.J.S.A. 47:1A-5.g. in not providing the Complainant a written response to the request...”

In this complaint, the same ruling should apply. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian’s failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g. Further, the Custodian certifies that he has now made it his policy to respond to all future requests in writing.

**Whether the Custodian’s failure to provide a written response to the Complainant’s OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Complainant states that he submitted his OPRA request on January 9, 2006. He claims that he did not receive a written response from the Custodian but states that the Custodian contacted him by phone on January 13, 2006. The Complainant states that on said date, the Custodian explained that his request for a copy of the RFP or contract used to secure telephone equipment in the high school and the middle school would have to be researched and would be provided. Additionally, the Complainant states that the Custodian informed him that his request for a copy of the most current construction report from Bovis Lend Lease, Inc. regarding the high school and the middle school was being denied as per the Board Attorney’s advice regarding potential litigation and that disclosure of this financial information would provide an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies receiving the Complainant’s OPRA request on or about January 2, 2006 and claims to have attempted to contact the Complainant by phone several times in the seven (7) business days following the date of the Complainant’s request. The Custodian certifies reaching the Complainant by phone on or about January 11, 2006 and verbally provided the Complainant with information responsive to his request for state contract numbers used for telephone equipment. He also certifies that this information had to be researched and compiled and does not exist as a separate record made, maintained, received, or kept on file pursuant to N.J.S.A. 47:1A-1. Additionally, the Custodian certifies informing the Complainant that the requested Bovis document would not be provided pursuant to N.J.S.A. 47:1A-1.1 as it would provide an

advantage to competitors or bidders, if disclosed. The Custodian certifies that at the time of the request, the Board was, and remains in negotiations with contractors regarding the new high school project. He also states that he is aware that once negotiations have been completed, the requested document would become a government record. Further, the Custodian asserts that as the Complainant's request was the first OPRA request he received as Custodian, it has now become his policy to respond to all requests in writing.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

In Fallstick v. Haddon Township and Haddon Township Business Partners, Inc., GRC Case No. 2004-73 (October, 2004), the Council held that "[t]he Township violated N.J.S.A. 47:1A-5.g. by not providing written responses to the February 13, 2004 and May 5, 2004 OPRA requests. However, the violations do not rise to the level of a knowing and willful violation in the totality of the circumstances as the Complainant received verbal notices and has acknowledged same."

The situation in this complaint is similar. Although the Custodian violated N.J.S.A. 47:1A-5.g. by not providing the Complainant with a written response to his request, both parties agree that verbal communication took place during the statutorily mandated seven (7) business days following the date of the Complainant's request. Additionally, the Custodian certifies that as the Complainant's request was the first OPRA request he received as Custodian, it has now become his policy to respond to all requests in writing. Further, the Custodian certifies providing the Complainant with information responsive to his request, even though OPRA does not require custodians to conduct research in response to requests.

While the Custodian's actions were negligent, heedless or unintentional, the Custodian has not knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard established for same established by New Jersey Courts.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:



1. A record (the contract requested) should have been provided to the Complainant *immediately* pursuant to N.J.S.A. 47:1A-5.e., unless such record was not immediately available because it was in storage or archived. The Custodian never asserted that the requested contract was in storage or archived. Therefore, the Custodian unlawfully denied immediate access to the RFP or contract used to secure telephone equipment in the high school and the middle school verbally over the telephone pursuant to N.J.S.A. 47:1A-5.e.
2. Although both the Complainant and the Custodian agree that they engaged in verbal communication regarding the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame, the Custodian's failure to provide a written response to said request is a violation of N.J.S.A. 47:1A-5.g.
3. While the Custodian provided facts that support the legal basis for the denial of access to the construction reports (that the information, which, if disclosed, would give an advantage to competitors or bidders), the Council should conduct an *in camera* review of the requested 39 page document prepared by Bovis Lend Lease, Inc. to determine if said report, or portions therein are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006).
4. While the Custodian's actions were negligent, heedless or unintentional, the Custodian has not knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard established for same established by New Jersey Courts.

Prepared By: Dara Lownie  
Dara Lownie  
Case Manager

Approved By: Catherine Starghill  
Catherine Starghill, Esq.  
Executive Director

September 7, 2006

**DRAFT  
STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

**Steven Siebenlist<sup>36</sup>  
Complainant**

**GRC Complaint No. 2006 - 81**

**v.**

**Department of Health and Senior Services (DOHSS)<sup>37</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of all information dealing with Union Hospital complaint # NJ00011811.

**Request Made:** March 31, 2006<sup>38</sup>

**Response Made:** No response<sup>39</sup>

**Custodian:** Paula Howard

**GRC Complaint filed:** April 22, 2006

**Background**

**March 31, 2006**

Complainant's Open Public Records Act ("OPRA") request asking for the records enumerated above.

**April 22, 2006**

Denial of Access Complaint filed with the Government Records Council ("GRC"). The Complainant states that between April 12, 2006 and April 21, 2006 he called and left four (4) messages with the Records Custodian and did not receive a response.

**April 25, 2006**

Offer of Mediation sent to both parties.

**April 27, 2006**

Custodian's Agreement to Mediate. The Complainant did not agree to mediate this complaint.

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<sup>36</sup> No legal representation listed.

<sup>37</sup> Represented by the Division of Law (DOL).

<sup>38</sup> As stated by the Complainant on his Denial of Access Complaint. The date on the OPRA request form is March 30, 2006, however the time on the request is 7:58 P.M, making March 31, 2006 the first business day of the request.

<sup>39</sup> The Complainant states in his response that he did not receive a response. However, the Custodian certifies that documents were mailed to the Complainant on April 26, 2006.

**April 26, 2006**

Letter from the Custodian to the Complainant. The Custodian states that she has marked the requested surveyor's notes in blue ink to indicate two sections where redacted confidential information was removed. The Custodian states that on page one (1) she has redacted a paragraph where the surveyor cited verbatim language from the incident report. The Custodian informs the Complainant that she also redacted language in the last paragraph on page two (2) of the surveyor's notes because the section included verbatim language from the incident report. The Custodian informs the Complainant that the hospital exercises exclusive authority and control over the incident report, therefore the Department cannot release any information obtained from that report.

**May 2, 2006**

Request for Statement of Information sent to the Custodian.

**May 5, 2006**

Custodian's Statement of Information ("SOI") with attachments:

- August 4, 2005 – Letter from the Director of Acute Care Survey at DOHSS to the Complainant
- March 6, 2006 – Letter from the Supervisor of Inspections of Acute Care Survey at DOHSS to the Complainant
- March 31, 2006 – OPRA request
- April 26, 2006 – Letter from the Custodian to the Complainant in reference to the Complainant's OPRA request

Custodian's Counsel states that the custodian in Acute Care Survey (ACS) forwarded the request to Director Alison Gibson for review on April 3, 2006. Counsel states that the Director subsequently forwarded the request to the program staff for the retrieval of the requested records on or about April 4, 2006.

Counsel states that the unit staff generally contacts the requestor directly within the seven (7) business day period to indicate that the request has been received and to explain what documents are available. Counsel states that this particular request, however, generated internal debate among the custodian, program staff and the program director concerning disclosure of certain files. Counsel goes on to state that during the discussions/disagreements regarding this request, no one remembered to call the requestor to confirm the availability of records and or the mailing date.

Counsel states that the initial package of documents was forwarded by ACS unit staff to the Custodian via interoffice mail sometime during the week of April 17, 2006. Counsel states that the Custodian was on vacation from April 17 thru April 21, 2006. During this time, Counsel states that Edward Paknis assumed responsibility for reviewing the Custodian's e-mail and transmitting records requests to the unit staff for processing. Counsel states that Mr. Paknis did not open the Custodian's mail, and was therefore unaware that information responsive to the request had been forwarded to the Custodian.

Upon return to work, Counsel states that the Custodian located the documents package, reviewed same, and determined that the documents were not fully responsive to

the requestor's inquiry. He (Counsel) also states that the Custodian contacted program staff on April 24, 2006 and was advised that the Program Director was unavailable until April 26, 2006 as she was attending a conference. Custodian's Counsel states that program staff and the Custodian were able to contact the Program Director via e-mail to resolve the outstanding issue regarding disclosure of certain documents. As such, those documents were compiled and packaged on April 26, 2006.

As certified by the Custodian, below is an itemized list of documents made, maintained and kept on file by the Division of Health Care Quality and Oversight on March 30, 2006, and thus responsive to the request (subject to this complaint):

1. July 22, 2005 letter from Carole Siebenlist.
2. August 4, 2005 letter to Carole Siebenlist from Director Alison Gibson.
3. March 6, 2006 letter to Carole Siebenlist from Director Alison Gibson .
4. March 27, 2006 e-mail from Steven to hcsa.@doh.state.nj.us forwarded to Kathleen DaMarcky.
5. March 29, 2006 e-mail response to Steven Siebenlist from Kathleen DeMarcky.
6. Surveyor's notes of October 31, 2005.

The Custodian provided the following documents to the Complainant in response to OPRA request #W20569:

1. Item #2 above provided to the Complainant via regular mail on April 26, 2006.
2. Item #3 above provided to the Complainant via regular mail on April 26, 2006.
3. Item #6 above provided to the Complainant via regular mail on April 26, 2006. (One paragraph and one sentence redacted because language referenced confidential information obtained from a "hospital internal document" under the authority and control of the hospital.)

The Custodian did not provide the following documents to the Complainant, listed above in response to OPRA request #W20569:

1. Item #1 (information originated with the request, and already in possession of the Complainant.)
2. Item # 4 (information e-mailed to the requestor prior to the date of the request.)
3. Item #5 (information e-mailed to requestor prior to the date of the request.)

### **Analysis**

#### **Whether the Custodian unlawfully denied access to any of the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...The terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.”

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant states that between April 12, 2006 and April 21, 2006 he called and left four (4) messages with the Custodian and did not receive a response.

The Custodian did not provide the following documents to the Complainant, listed above in response to OPRA request #W20569:

1. Item #1 (information originated with the request, and already in possession of the Complainant.)
2. Item # 4 (information e-mailed to the requestor prior to the date of the request.)
3. Item #5 (information e-mailed to requestor prior to the date of the request.)

In an April 26, 2006 letter, to the Complainant, the Custodian states that on page one (1) of the surveyor’s notes she has redacted a paragraph where the surveyor cited verbatim language from the incident report. The Custodian also informs the Complainant that she also redacted language in the last paragraph on page two (2) of the surveyor’s notes because the section included verbatim language from the incident report. The Custodian informs the Complainant that the hospital exercises exclusive authority and control over the incident report, therefore the Department cannot release any information obtained from that report.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Caggiano v. Borough of Stanhope, GRC Case No. 2005-211 et seq.<sup>40</sup> (January, 2006), the Council held that “OPRA does not limit the number of times a requestor may ask for the same record even when the record was previously provided.” Therefore, in the instant case, the fact that the Complainant possibly already had certain documents in his

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<sup>40</sup> Caggiano v. Borough of Stanhope, GRC Case No. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250, 2005-252 (January, 2006.)

possession is irrelevant under OPRA, as there is no restriction under the law that a requestor may not request copies of documents already in their possession. In this case, the three documents seemingly in the possession of the Complainant before the request was made should have been provided to the Complainant in response to his request assuming there was no lawful exemption to same.

Based on Caggiano, the Custodian is in violation of N.J.S.A. 47:1A-1 for not providing the Complainant with documents the Custodian states are already in the Complainant's possession as well as stating that certain documents were e-mailed to the Complainant prior to the date of the request. Therefore, the Custodian should release the documents responsive to the Complainant's request, with proper redactions pursuant to OPRA that the Custodian claims are already in the Complainant's possession.

The Custodian is also in violation of N.J.S.A. 47:1A-6 for not bearing her burden of proving that the redacted information in the surveyor's notes is authorized by law. Based on the above, the Council should conduct an *in camera* inspection of the surveyor's notes to determine if the records are exempt from disclosure.

**Whether the Custodian responded to the February 7, 2006 OPRA request within the statutorily required seven (7) business days?**

OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g

Custodian's Counsel states that a custodian in Acute Care Survey (ACS) forwarded the request to Director Alison Gibson for review on April 3, 2006. Counsel states that the Director subsequently forwarded the request to the program staff for the retrieval of the requested records on or about April 4, 2006.

Counsel states that the unit staff generally contacts the requestor directly within the seven (7) business day period to indicate that the request has been received and to explain what documents are available. Counsel states that this particular request, however, generated internal debate among the custodian, program staff and the program director concerning disclosure of certain files. Counsel goes on to state that during the

discussions/disagreements regarding this request, no one remembered to call the requestor to confirm the availability of records and/or the mailing date.

OPRA requires a Custodian to grant or deny access to a government record in writing, as soon as possible, but not later than seven (7) business days after receiving the request.

In Paff v. Borough of Somerville, GRC Case No. 2005-55 (November 2005), the Council held that the Custodian was in violation of N.J.S.A. 47:1A-5.i. for failing to respond in a timely manner even though the Custodian asserted the delay was caused by his efforts to obtain legal advice. Although in the instant case the Custodian was not attempting to obtain legal advice, the fact that this request generated internal debate among the Custodian, program staff and the program director concerning disclosure of certain files, and no one remembered to call the requestor to confirm the availability of records and/or the mailing date, is not a legally sufficient defense under OPRA.

Therefore, pursuant to Paff, the Custodian is in violation of N.J.S.A. 47:1A-5.i. as well as N.J.S.A. 47:1A-5.g based the fact that the Complainant's OPRA request was received on March 31, 2006 and was not responded to until April 26, 2006.

**Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law under the totality of the circumstances. Specifically OPRA states:

“...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Complainant alleges that between April 12, 2006 and April 21, 2006 he called and left four (4) messages with the Custodian and did not receive a response.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v.

Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

While the Custodian did not respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, denied access to portions of the surveyor's notes without providing a sufficient legal basis for doing same, and denied access to records the Custodian previously provided to the Complainant in violation of OPRA pursuant to N.J.S.A. 47:1A-1 and Caggiano v. Borough of Stanhope, GRC Case No. 2005-211 et seq.<sup>41</sup> (January, 2006), the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard for same established by the New Jersey Courts.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council find that:

1. Based on Caggiano v. Borough of Stanhope, GRC Case No. 2005-211 et seq.<sup>42</sup> (January, 2006), the Custodian is in violation of N.J.S.A. 47:1A-1 for not providing the Complainant with documents the Custodian states are already in the Complainant's possession as well as stating that certain documents were e-mailed to the Complainant prior to the date of the request. Therefore, the Custodian should release the documents responsive to the Complainant's request, with proper redactions pursuant to OPRA that the Custodian claims are already in the Complainant's possession.
2. The Custodian is in violation of N.J.S.A. 47:1A-6 for not bearing her burden of proving that the redacted information in the surveyor's notes is authorized by law. Based on the above, the Council should conduct an *in camera* inspection of the surveyor's notes to determine if the records are exempt from disclosure.
3. Pursuant to Paff v. Borough of Somerville, GRC Case No. 2005-55 (November 2005) as well as the fact that the Complainant's OPRA request was received on March 31, 2006 and was not responded to until April 26, 2006 the Custodian is in violation of N.J.S.A. 47:1A-5.i. as well as N.J.S.A. 47:1A-5.g.
4. While the Custodian did not respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, denied access to portions of the surveyor's notes without providing a sufficient legal basis for doing same, and denied access to records the Custodian previously

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<sup>41</sup> Caggiano v. Borough of Stanhope, GRC Case No. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250, 2005-252 (January, 2006.)


<sup>42</sup> Caggiano v. Borough of Stanhope, GRC Case No. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250, 2005-252 (January, 2006.)



provided to the Complainant in violation of OPRA pursuant to N.J.S.A. 47:1A-1 and Caggiano v. Borough of Stanhope, GRC Case No. 2005-211 et seq.<sup>43</sup> (January, 2006), the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. and the legal standard for same established by the New Jersey Courts.



Prepared By: Christopher Malloy  
Case Manager

Approved By:   
Catherine Starghill, Esq.  
Executive Director

September 7, 2006

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<sup>43</sup> Caggiano v. Borough of Stanhope, GRC Case No. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250, 2005-252 (January, 2006.)

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Complaint Withdrawn**

**GRC Complaint No:** 2005 - 97

**Complainant:** Vesselin Dittrich<sup>44</sup>

**Custodian:** City of Hoboken – James Farina<sup>45</sup>

**Date of Request:** April 25, 2005

**Date of Complaint:** May 12, 2005

**Case Disposition:** The Complainant withdrew this case via letter dated July 10, 2006.

**Type of Administrative Disposition:** Complaint withdrawn

**Effective Date of Disposition:** September 21, 2006



Prepared By:

Christopher Malloy  
Case Manager



Approved By:

Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

<sup>44</sup> No legal representation listed

<sup>45</sup> Represented by Joseph Sherman, Esq. Corporation Counsel, Hoboken, NJ

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Complaint Withdrawn**

**GRC Complaint No:** 2005-202 \_\_\_\_\_

**Complainant:** Steven Kossup \_\_\_\_\_

**Custodian:** Essex County Correctional Facility, Tameka Foreman/Terrianne Moore  
Abrams \_\_\_\_\_

**Date of Request:** May 30, 2006 \_\_\_\_\_

**Date of Complaint:** July 28, 2006 \_\_\_\_\_

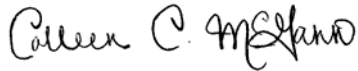
**Case Disposition:**

The Complainant voluntarily withdrew this complaint in writing to the GRC on September 7, 2006.

**Type of Administrative Disposition:** Complaint withdrawn.

**Effective Date of Disposition:** September 21, 2006

Prepared By:



Colleen C. McGann  
Case Manager

Approved By:



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-58

**Complainant:** Richard D. De La Roche

**Custodian:** Township of Mt. Olive – Lisa Lashway

**Date of Request:** February 23, 2006

**Date of Complaint:** March 15, 2006

**Case Disposition:** The Complainant signed the Mediation Settlement Agreement dated August 21, 2006 on August 21, 2006. The Custodian signed the Mediation Settlement Agreement on August 23, 2006.

**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

Prepared By:

*Catherine Starghill*

Catherine Starghill, Esq.  
Executive Director

Date:

September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – No Records Responsive to the Request**

**GRC Complaint No:** 2006-76

**Complainant:** Barbara Stoltz<sup>46</sup>

**Custodian:** Cape May County Board of Health, Stephen O'Connor<sup>47</sup>

**Date of Request:** March 23, 2006 and April 4, 2006

**Date of Complaint:** April 4, 2006

**Case Disposition:** The Custodian certifies that there are no records responsive to the Complainant's Open Public Records Act ("OPRA") request.

**Type of Administrative Disposition:** No records responsive to the request.

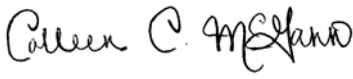
**Applicable OPRA Provision:**

OPRA provides:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* in the course of his or its official business... or that has been *received* in the course of his or its official business..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St. PO Box 006, Trenton, NJ 08625-0006.

**Effective Date of Disposition:** September 21, 2006

Prepared By:   
Colleen C. McGann  
Case Manager

Approved By:   
Catherine Starghill, Esq.

<sup>46</sup> No legal representation listed.

<sup>47</sup> Represented by County Counsel John C. Porto, Esq. located in Cape May Court House, NJ.

Executive Director

**Date:** September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-80

**Complainant:** John Paff<sup>48</sup>

**Custodian:** Kean University – Rose Marie Saracino<sup>49</sup>

**Date of Request:** October 24, 2005

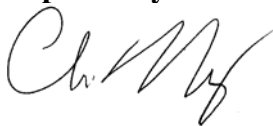
**Date of Complaint:** October 26, 2005

**Case Disposition:** Case settled in Mediation and finalized August 4, 2006

**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

**Prepared By:**



Christopher Malloy  
Case Manager

**Approved By:**



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

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<sup>48</sup> No legal representation

<sup>49</sup> Represented by Jerome J. Convery, Law Offices of Jerome J. Convery, Old Bridge, N.J.

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-82

**Complainant:** John Paff

**Custodian:** Township of Chester, Mary Edwards

**Date of Request:** April 3, 2006

**Date of Complaint:** April 12, 2006

**Case Disposition:** The Complainant signed the Mediation Settlement Agreement dated September 5, 2006 on September 8, 2006. The Custodian signed the Mediation Settlement Agreement on September 6, 2006.


**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

Prepared By:

Tiffany L. Mayers  
Case Manager

Approved By:

  
Catherine Starghill, Esq.  
Executive Director

**Date:** September 11, 2006



**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-87

**Complainant:** Joanne Ingemi

**Custodian:** Town of Hammonton, April Boyer Maimone

**Date of Request:** April 7, 2006

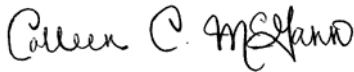
**Date of Complaint:** April 7, 2006

**Case Disposition:** The Complainant signed the Mediation Settlement Agreement dated July 20, 2006 on August 31, 2006. The Custodian signed the Mediation Settlement Agreement on August 10, 2006.

**Type of Administrative Disposition:** Settled in Mediation

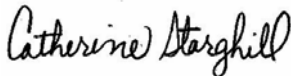
**Effective Date of Disposition:** September 21, 2006

Prepared By:



Colleen C. McGann  
Case Manager

Approved By:



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-89

**Complainant:** Martin O'Shea<sup>50</sup>

**Custodian:** Pooled Insurance Program of New Jersey – Debra Ginetto<sup>51</sup>

**Date of Request:** May 1, 2006

**Date of Complaint:** May 15, 2006

**Case Disposition:** Case settled in Mediation and finalized August 28, 2006<sup>52</sup>

**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

**Prepared By:**



Christopher Malloy  
Case Manager

**Approved By:**



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

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<sup>50</sup> No legal representation

<sup>51</sup> Represented by Russell Huntington, Huntington Bailey, L.L.P. Westwood, N.J.

<sup>52</sup> In the Mediation Agreement, it is stated that the Complainant agrees to withdraw this Complaint

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – No Records Responsive to the Request**

**GRC Complaint No:** 2006-97

**Complainant:** A.J. Nash<sup>53</sup>

**Custodian:** Passaic Superintendent of Schools – Dr. Gilmartin<sup>54</sup>

**Date of Request:** January 10, 2006

**Date of Complaint:** April 10, 2006

**Case Disposition:** The Custodian certifies that there are no documents responsive to the Complainant's requests for information from April 26, 2006, June 18, 2006 and July 7, 2006.<sup>55</sup>

**Type of Administrative Disposition:** No records responsive to the request.

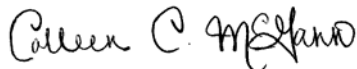
**Applicable OPRA Provision:**

OPRA defines a "government record" as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or *that has been received* in the course of his or its official business..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St. PO Box 006, Trenton, NJ 08625-0006.

**Effective Date of Disposition:** September 21, 2006

Prepared By:   
Colleen C. McGann  
Case Manager

Approved By: 

<sup>53</sup> None listed.

<sup>54</sup> Legal representation listed as the New Jersey Office of the Attorney General.

<sup>55</sup> The Custodian provided copies of these requests. On July 10, 2006 the Government Records Council ("GRC") asked the Complainant to provide copies of the original OPRA request, which the Complainant states was filed on January 10, 2006. However, the Complainant failed provide the GRC with a copy of that OPRA request.

Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No: 2006-104**

**Complainant: John Paff**

**Custodian: Union Township Board of Education – Kerry Sevilis**

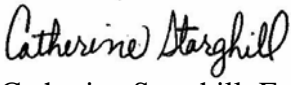
**Date of Request: May 8, 2006**

**Date of Complaint: June 5, 2006**

**Case Disposition:** The Complainant signed the Mediation Settlement Agreement dated August 14, 2006 on August 14, 2006. The Custodian signed the Mediation Settlement Agreement on August 31, 2006.

**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

Prepared By:   
Catherine Starghill, Esq.  
Executive Director

Date: September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
Administrative Case Disposition – Not a Valid OPRA Request

**GRC Complaint No:** 2006-114

**Complainant:** A.J. Nash

**Custodian:** State of New Jersey, Department of Law and Public Safety, Division of Consumer Affairs Board of Examiners – Robert Campanelli

**Date of Request:** April 1, 2006

**Date of Complaint:** April 10, 2006

**Case Disposition:** The Custodian certifies that no OPRA request was ever made to the Division of Consumer Affairs Board of Examiners or any of its units.

**Type of Administrative Disposition:** Not a valid OPRA request.

**Applicable OPRA Provision:**

OPRA states:

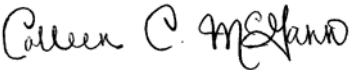
“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought...” N.J.S.A. 47:1A-5.f.


OPRA also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....” N.J.S.A. 47:1A-5.g.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St. PO Box 006, Trenton, NJ 08625-0006.

**Effective Date of Disposition:** September 21, 2006

Prepared By:   
Colleen C. McGann  
Case Manager

Approved By:   
Catherine Starghill, Esq.  
Executive Director

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-115

**Complainant:** Paula Baldwin

**Custodian:** Township of Readington, Vita Mekovetz

**Date of Request:** May 5, 2006

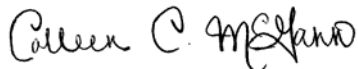
**Date of Complaint:** June 5, 2006

**Case Disposition:** The Complainant signed the Mediation Settlement Agreement dated July 19, 2006 on August 4, 2006. The Custodian signed the Mediation Settlement Agreement on August 15, 2006.

**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

Prepared By:



Colleen C. McGann  
Case Manager

Approved By:



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Complaint Withdrawn**

**GRC Complaint No:** 2006-117

**Complainant:** Luis M. Perez<sup>56</sup>

**Custodian:** Borough of Glassboro – Patricia Frontino<sup>57</sup>

**Date of Request:** June 2, 2006

**Date of Complaint:** June 8, 2006

**Case Disposition:** On August 23, 2006 the Complainant sent an e-mail to the Government Records Council staff stating that this case has been complied with.

**Type of Administrative Disposition:** Complaint withdrawn

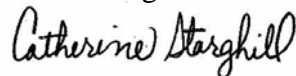
**Effective Date of Disposition:** September 21, 2006

Prepared By:



Christopher Malloy  
Case Manager

Approved By:



Catherine Starghill, Esq.  
Executive Director

Date: September 7, 2006

<sup>56</sup> No legal representation listed

<sup>57</sup> Represented by Timothy Scaffidi, Law Offices of Timothy Scaffidi, Woodbury, N.J.



**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-120

**Complainant:** Ann Bernice Segal

**Custodian:** Moorestown Public Schools, Robert J. Oldt, Jr.

**Date of Request:** May 30, 2006

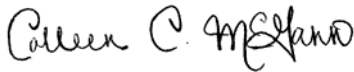
**Date of Complaint:** June 12, 2006

**Case Disposition:** The Complainant signed the Mediation Settlement Agreement dated August 15, 2006 on August 21, 2006. The Custodian signed the Mediation Settlement Agreement on September 1, 2006.

**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

Prepared By:



Colleen C. McGann  
Case Manager

Approved By:



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Complaint Withdrawn**

**GRC Complaint No:** 2006-129

**Complainant:** Joseph Tetelman<sup>58</sup>

**Custodian:** New Jersey State Police - Jeanne Hengemuhle<sup>59</sup>

**Date of Request:** June 1, 2006

**Date of Complaint:** June 21, 2006

**Case Disposition:** The Complainant withdrew this case via letter dated July 21, 2006.  
(The Government Records Council did not receive the letter until August 16, 2006.)

**Type of Administrative Disposition:** Complaint withdrawn


**Effective Date of Disposition:** September 21, 2006

Prepared By:



Christopher Malloy  
Case Manager

Approved By:



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

<sup>58</sup> No legal representation listed

<sup>59</sup> No legal representation listed

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Settled in Mediation**

**GRC Complaint No:** 2006-134

**Complainant:** John Paff<sup>60</sup>

**Custodian:** Borough of Hampton – Cathy Drummond<sup>61</sup>

**Date of Request:** June 6, 2006

**Date of Complaint:** July 3, 2006

**Case Disposition:** Case settled in Mediation and finalized August 23, 2006

**Type of Administrative Disposition:** Settled in Mediation

**Effective Date of Disposition:** September 21, 2006

**Prepared By:**



Christopher Malloy  
Case Manager

**Approved By:**



Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

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<sup>60</sup> No legal representation

<sup>61</sup> Represented by Richard P. Cushing, Law Offices of Gebhardt & Kiefer, Clinton, N.J.

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Complaint Withdrawn**

**GRC Complaint No:** 2006-142

**Complainant:** Thomas Caggiano<sup>62</sup>

**Custodian:** New Jersey Government Records Council

**Date of Request:** May 30, 2006

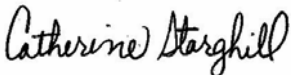
**Date of Complaint:** July 28, 2006

**Case Disposition:** The Complainant voluntarily withdrew this complaint in writing to the GRC on August 31, 2006.

**Type of Administrative Disposition:** Complaint withdrawn.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St. PO Box 006, Trenton, NJ 08625-0006. **(Do not use this paragraph for withdrawals, mediation or settlements)**

**Effective Date of Disposition:** September 21, 2006

Prepared and  
Approved By:   
Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

<sup>62</sup> No attorney on record.

**DRAFT**  
**GOVERNMENT RECORDS COUNCIL**  
**Administrative Case Disposition – Complaint Withdrawn**

**GRC Complaint No: 2006-146**

**Complainant: Joe Truland<sup>63</sup>**

**Custodian: Englishtown Borough Police Department<sup>64</sup>**

**Date of Request: July 18, 2006**

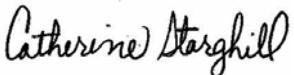
**Date of Complaint: August 3, 2006**

**Case Disposition:** The Complainant voluntarily withdrew this complaint in writing to the GRC on August 28, 2006.

**Type of Administrative Disposition:** Complaint withdrawn.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St. PO Box 006, Trenton, NJ 08625-0006. **(Do not use this paragraph for withdrawals, mediation or settlements)**

**Effective Date of Disposition:** September 21, 2006

Prepared and  
Approved By:   
Catherine Starghill, Esq.  
Executive Director

**Date:** September 7, 2006

<sup>63</sup> No attorney on record (Complainant is an attorney).

<sup>64</sup> No attorney on record.

